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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

JOEL PARKER WHITNEY AND FRANKLIN H. STORY,
Appellants,
vs.
THE UNITED STATES, ET AL.,
Appellees.

Appeal from the Court of Private Land Claims.

ARGUMENT OF JOHN H. KNAEBEL AND ERNEST KNAEBEL, COUNSEL FOR THE APPELLANTS.

JNO. H. KNAEBEL,
ERNEST KNAEBEL,
of Counsel for Appellants.

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Statement and Analysis.

The United States Court of Private Land Claims, sitting at Santa Fé, New Mexico, having (STONE, J.,

dissenting), on the twentieth of December, 1898, made its decree rejecting the Mexican land grant known as the Estancia grant (and sometimes called the Antonio Sandoval grant), affecting a large tract of land in the county of Valencia in that Territory (*Transcript*, fol. 190), the claimants, Joel Parker Whitney and Franklin H. Story, of Boston, Mass., now seek by the present appeal (*Ib.*, fols. 192, 193, etc.) to have the said decree reversed and the grant confirmed.

The private persons named among the appellees, although duly cited (*Ib.*, fols. 195, 196), do not contend, for they were made parties only because they were claimants of the alleged Bartolomé Baca grant, which was finally rejected by this court before the present case was tried below. (*Bergere vs. United States*, 168 U. S. 66, wherein the opinion, at pages 78, 84 and 85, refers to certain conflicting subsequent grants, including the Estancia.)

The following facts were proved on the trial, in support of the allegations of our petition, viz.:

1. Antonio Sandoval, when he petitioned for the grant in question, was a resident Mexican citizen, of high distinction, who had theretofore, for many years, served the Republic of Mexico as a civil and military officer, and also greatly aided the said republic by loans and advances of large sums of money out of his private estate, for which the said republic was then his debtor. (*Ib.*, fols. 2, 3, 70, 71, 72; also testimony of Mr. Tipton, fols. 43, 44; also declaration of the surveyor general, that "it is a matter of history and common notoriety that Don Antonio Sandoval was, under the Mexican rule, a man of great activity, wealth and influence, and that his government owed him for many years

large sums of money, which it was either unable or unwilling to pay him," fol. 89; also Bancroft's History of Arizona and New Mexico, pages 310 (note), 315 (note), and 322, showing that Prefect Sandoval was, in 1841, summoned to act as governor, while Armijo was absent on a campaign against the Texan invaders.)

2. On or before the seventh day of December, A. D. 1845, when New Mexico was still one of the co-equal uniform departments of Mexico, under the central system of administration, Antonio Sandoval presented to Manuel Armijo, governor and military commandant of that department, and who was "the *only* and *necessary* conduct of communication with the Supreme Authorities of the Republic" (Decree of June 13th, 1843, Art. 141; Reynolds, 247), a written petition (*Transcript*, fols. 3, 70, 75), signed by him, and dated on the fifth day of the same month, whereby he prayed the said governor, "*in the name of the supreme authority of the Mexican nation*," to grant him in possession *integram* the Salt Lakes tract, assigning as boundaries towards the north one league from the Berrendo Spring, the said Berrendo Spring being within the possession, and towards the south from the Salt Lakes another league; on the east the little hills of the Pedernal, and on the west the water of the Mesteñas, and whereby he represented to the said governor that the tract of land so solicited was vacant and in a condition of mortmain *(á manos muertas)*, that the grant so solicited would be without prejudice to any third party, and that he desired to use the said tract for the pasture of his live stock, which was considerable.

In the petition, Sandoval recited that for up-

wards of thirty years he had been rendering services to the country, as well with his person as with his estate, without having interposed the least objection, and without having received any compensation, and therefore he asked that the grant be made in *compensation* for such services *(á mosion de recompensa á los servicios q. dejo referidos)*, and free and exempt from tax. He expressly prays the grant "for the sake of *justice*."

With his petition, Antonio Sandoval submitted to the governor for his consideration an official certificate of José Serafin Ramirez y Casanoba, comptroller of the departmental treasury and acting treasurer of the same, dated on the sixth day of the same month, whereby the said comptroller and acting treasurer certified that, during the period of forty years (as appeared from records of the treasury), the said Antonio Sandoval had been serving the nation as a military and civil officer, and also that he had loaned numerous sums of money to the treasury of the nation without receiving one half real interest, and that there were then large sums due him, as appeared from the entries in the office of the said comptroller and treasurer and the evidences in Sandoval's possession, on account of salaries and loans. *(Ib.*, fols. 72 and 77.)

3. The solicited grant was then made, in absolute terms as follows *(Ib.*, fols. 71, 76):

"Santa Fe, December 7, 1845.

"This government, being convinced of the valuable [in the original '*análogos*'] services Don Antonio Sandoval has rendered, and is now rendering, the country, during the time to which he refers, as also during the six years he served administer-

ing the prefecture of the Second district, with the salary of one thousand five hundred dollars, of which not even a half real has been paid to him, the sum due him amounting to nine thousand dollars, and the *statements in this petition being true*, I do, in the exercise of the power in me vested by the laws *(las facultades que me conceden las leyes)*, and also in consideration of all the premises, and as a just title acquired *(como con justo titulo adquirido)*, make him the grant for the land he solicits, with all the dimensions and pasture land he asks, that he may enjoy the same *in the name of the supreme government* (*supremo gov'no*) of the Mexican nation, and under my concession free and exempt from all tax or tribute.

"MAN'L ARMIJO."

4. On the fifteenth of December, 1845, juridical possession, or livery of seisin, of the granted premises was duly delivered, and the magistrate officiating, José Baca y Ortiz, executed, with his attending witnesses, Joaquin Somohano and Pablo Delgado, the proper written act, or instrument, of juridical possession, "that it may serve him as formal title." *(Ib.*, fols. 73, 78, 79.)

5. As appears by the certificate of the register, Donaciano Vigil (secretary under the American provisional government), endorsed on the title papers, the same were recorded in Book B, folios 166 and 167, and so certified November 17, 1849. (*Ib.*, fol. 74.) This "Book B" is one of the missing archives of the government, although it did not disappear until about 1879. *(Ib.*, fols. 47, 50.) It was kept under the compulsory provisions of the Kearny Code, promulgated by General Kearny, September 22, 1846, published as part of the Compiled Laws of

New Mexico of 1897. *Vide* title "Register of Lands," pages 85, etc., of that compilation. We cite the said provisions next below:

"REGISTER OF LANDS.

"SECTION 1. An office, called the office of the register of lands, is established, which shall be kept at the city of Santa Fé.

"Sec. 2. Until otherwise directed by law, the duties of said office shall be discharged by the secretary of the Territory.

"Sec. 3. The register shall procure for the use of his office large, well-bound books, wherein shall be recorded, in fair, legible hand, all instruments of writing herein required to be recorded.

"Sec. 4. It shall be the duty of the register of lands to record all papers and documents of and concerning lands and tenements situated in this territory, which were issued by the Spanish and Mexican governments, remaining in the archives of the secretary of the territory, or which were in any of the offices of the department of New Mexico under the Mexican government.

"Sec. 5. Every person claiming lands in this territory, by virtue of any Spanish or Mexican grant, may deliver to the register of lands a notice in writing, stating the nature and extent of his claim, and shall also at the same time deliver to the register of lands, for the purpose of being recorded, the grant, order of survey, deed of conveyance, or other written evidence of his claims, and the same shall be recorded by the register, for which the party shall pay him twelve and one-half cents per hundred words contained in such written evidence of the claims.

"Sec. 6. When there is no written evi-

dence of the claim, the claimant may take evidence in writing, before some officer having authority to administer oaths, showing the nature and extent of his claim, how much of the land claimed has been actually cultivated and inhabited by himself, and those under whom he claims, and for what length of time; and also as to any grant, deed or conveyance relating to said land having ever existed, or any record thereof having ever been made, and as to the loss or destruction of the same, and how and when such loss and destruction happened. If any person shall neglect to deliver such evidence and notice of his claim, as prescribed in this and the preceding section, within five years from the first day of January such claim shall be void.

"Sec. 7. The register of lands shall communicate to the governor, or either house of the general assembly, such information relating to his office as may be called for by them respectively. He shall also transmit to the commissioner of the general land office, at the city of Washington, once a year, beginning on the first day of January, 1848, a fair abstract of all lands claimed as aforesaid, for which services he shall be paid ten cents per hundred words contained in the said abstract, by the United States.

"Sec. 8. The register of lands shall procure, keep and use a seal of office, and shall furnish every person desiring it a certified copy of any record or paper in his office, authenticated by such seal, and shall receive for every copy at the rate of ten cents for every hundred words contained in it, and one dollar for the certificate and seal, to be paid by the applicant.

"Sec. 9. The register of lands shall faithfully keep all records, books, papers and

effects committed to his care, and shall not permit any book or paper to be taken out of his office unless the same be called for by the governor, the general assembly, or the constituted authorities of the United States.

"Sec. 10. Nothing contained in the fifth and sixth articles of this law shall be taken to include infants, married women, persons of unsound mind, nor those without the government of the United States, while such disabilities continue.

"Sec. 11. For every willful neglect of duty, or willful violation of laws in his office, the register of lands may be indicted, and, upon conviction, shall be removed from office and fined not exceeding one hundred dollars."

The Kearny Code was sanctioned judicially in *Leitensdorfer vs. Webb*, 20 How. 176, 177.

6. Antonio Sandoval, having thus acquired and received in his absolute possession, "*con justo titulo adquirido*," the large, well-defined tract of vacant public land, which had been granted to him in consideration and consequent *satisfaction* of his long-neglected, lawful claims against the Mexican government, retained the same under the solemn juridical livery of seisin, from which his *possessio pedis* dates, all through the following war, which lasted from May 13th, 1846, until the treaty of peace, dated February 2d, 1848, and proclaimed July 4th, 1848, and, four days after that proclamation, he conveyed the estate to his nephew, Gervacio Nolan, by an instrument (*Transcript*, fols. 80, 82), dated July 8th, 1848, whose authenticity is not questioned by the government (*Vide* answer, paragraph V; Transcript, fol. 35). In this conveyance, Antonio Sandoval says:

"It is my will to donate, as I do in effect donate, freely and legally, unto my nephew, Gervacio Nolan, the property of the Salt lakes, which was given and granted to me by the governor of the department of New Mexico, *in the name of the supreme government of Mexico*, on the seventh day of December, 1845, as evidenced by the foregoing deed of grant *(segun lo acredita el anterior titulo de donasion)*, marked with the letter 'A,' in virtue whereof I convey unto the aforesaid Nolan all the right, title and dominion held by me in said land, that he may enjoy the same as his lawful property."

Then follows a correct statement of the boundaries, after which the grantor adds:

"And, if my descendants or ascendants should raise any objection to this donation, I pray the magistrates that they be not heard in court or out of it, for such has been my will, and I desire the words of this instrument of conveyance *(esta Escritura Traspasada)* to be made durable and binding, and I also desire that the aforesaid Nolan shall enjoy the said land free from tax, tribute, mortgage *('ypoteca')*, or other incumbrance *(enagenacion)*, as well himself as his wife, children, heirs and successors, without there being any one to interpose against him any suit or other opposition at any time."

Since General Kearny took possession of New Mexico on the eighteenth of August, 1846, that district of country had been under American provisional government for nearly two years before the date of this conveyance. Hence it was personally acknowledged by Antonio Sandoval *(Ib.*, fols. 81, 83) on the

day of its date, before the clerk of the Circuit Court, appointed by Kearny for the county of Bernalillo.

NOTE.—The recital in this conveyance of the fact that the grant was *marked with the letter "A"* is abundant evidence that that distinguishing letter ("A"; *Transcript*, fol. 71) was on the grant at least fifteen months before the date of the certificate of registration by the register, Donaciano Vigil, November 17th, 1849, and consequently upwards of six years before the creation of the office of surveyor general for New Mexico (July 22d, 1854).

On the first of January, 1850, Gervacio Nolan (under the English form of his Christian name) made to Rufus Beach an indenture of lease, so-called, of the said property, for the term of five years (*Transcript*, fol. 87), which indenture reserved no annual rent, but was apparently executed in consideration of the covenant of Beach—

> "To occupy said premises for agriculture and procuring salt from the lake, and to construct one or more house or houses and corral for the convenience of workmen and the herding of stock on the premises, and to pay all Government taxes which may be assessed on all such part or parts of said premises as he shall occupy, and at the end of said term surrender said premises, with all the improvements thereon, to said Nolan."

Then follows a covenant by Nolan that—

> "On condition that the said Beach is successful in improving the premises, and makes them valuable, then the said Beach shall be entitled to the equal half part of the

rents and profits of the same for the five years next ensuing the term of this lease."

The instrument was witnessed by M. Ashurst and M. F. Tuley, respectable members of the bar, who afterwards were of record in *Leitensdorfer* vs. *Webb*, 1 N. M. 34.

It was afterwards recorded on pages 63 and 64, Vol. 4, of Land Claims Record, in the office of the surveyor general. (*Transcript*, fol. 88.)

NOTE.—The apparently generous terms of this document are significant evidence of the low value of unwatered lands in New Mexico at that time. They were certainly not worth more than the Sonora lands, which were sold by the public authorities at prices ranging from about thirteen cents an acre ($60 a sitio), as in the sale considered in *Ely's Administrator vs. United States*, 171 U. S., at page 236, down to less than four cents an acre ($15 a sitio), as in the sales considered in *Ainsa vs. United States*, 161 U. S., at page 214, and $80 a square league, as in the sale considered in *United States vs. Coe*, 170 U. S., at page 685 ($400 for five square leagues). In the first cited case (171 U. S., at page 236), it appears that the appraisers reported that the price of the sitios should be fixed as high as $60 each sitio, "because they have running water and several banks of arable land which can be made use of by cultivation," and this court, by Mr. Justice Brewer, well said (*Ib.*, page 238) that no presumption that the overplus surveyed and claimed, beyond the specific quantity bought, could be indulged from the inaction of the government or the failure of any individual to denounce the overplus, since "who there would care to question the right of a locator along a water-

way to any overplus of arid lands? Such overplus was of no value, and no third party would ever care to challenge the locator's right to this overplus, and the government, like the individual, was also indifferent."

There is, indeed, nothing "princely" in such grant holdings, any more than there is in the holdings of vastly greater tracts of the pampas of South America, and much of the eastern prejudice on the subject is ill-founded. The chief interest of the public lies in the quieting of the titles of arid areas in private ownership, so as to make them a source of public revenue under the taxing power.

8. In 1858, before the expiration of the second term of years granted to Rufus Beach by the said indenture, Gervacio Nolan died intestate (*Transcript*, fols. 84, 86, 89), leaving him surviving his widow, Maria de los Dolores, and several children, some of whom were minors. (*Ib.*, 84, 86.)

9. However, Gervacio Nolan had, on the 12th of July, 1855, filed with the surveyor general his petition for the confirmation of the said grant (*Transcript*, fol. 68), in course of which he alleges that the grant was made by the governor—

> "By virtue of the authority in him vested by the government of Mexico, as will appear by the statutes and collection of decrees of the aforesaid government, *and also by communications addressed to the aforesaid governor by the authorities of the aforesaid government of Mexico, which said communications are, or should be, deposited in the archives of this Territory*, and to which reference is made."

10. After the death of Gervacio Nolan, an

amended petition to the surveyor general was presented by his widow and children, two of whom were minors appearing by their guardian, wherein confirmation of the said grant was prayed (*Transcript*, fol. 84). The petition was subscribed by Theodore D. Wheaton, Esq., an eminent lawyer, who once held the office of United States Attorney for New Mexico.

The amended petition alleges, in positive terms,

> "That the said Armijo, during the time he was governor, as aforesaid, granted said land by virtue of the authority vested in him by the Mexican government, which authority will appear by the collection of statutes and decrees of the aforesaid government, *and also by communications addressed to the aforesaid governor by the authorities of the Mexican government, which said communications are to be found in the archives of the Territory*, and to which reference is made."

11. The authenticity and good faith of the grant and the juridical possession thereunder are established beyond cavil:

(1.) In the proceeding before Surveyor General Wilbar upon the petitions for confirmation of the grant, Pablo Delgado was examined as a witness (*Transcript*, fol. 86), and testified that he knew the signature of Manuel Armijo, and that the one shown him on document No. 1 (the petition and grant) is genuine, and that the signature of Antonio Sandoval on the same document is also genuine, and that at the date of said document Manuel Armijo was governor and commander-in-chief of New Mexico.

He further testified that he was present when the alcalde (José Baca) put Sandoval in possession

of the land, and that all the signatures to document C are genuine; also that the signature of Sandoval to document No. 3 is genuine. The documents referred to by this witness comprise our original title papers and the conveyance to Gervacio Nolan, which appear in the transcript at folios 70 to 83. His further testimony shows the death of Nolan and identifies the widow and issue.

(2.) Surveyor General Proudfit, before whom the proceeding was finally completed, says in his decision (*Transcript*, fol. 89), dated January 4, 1873, that "the original documents in Spanish, *which are genuine beyond all doubt*, show that the grant was made by Manuel Armijo, then the lawful and recognized governor of New Mexico under the Republic of Mexico, on the seventh December, 1845, to Antonio Sandoval, in accordance with Sandoval's petition of fifth December, 1845," that "on fifteenth December, 1845, Sandoval was duly placed in possession of the property by José Baca, a justice of the peace, and he and his legal representatives have so remained, it is believed, to this time, without dispute or question," that "the boundary calls are well-known natural objects and the location is certain," and that "on eighth July, 1848, Sandoval deeded the property to Gervacio Nolan, who was his nephew."

He adds: "I am of opinion that this title is perfect in the legal representatives of Gervacio Nolan, deceased, and recommend that it be confirmed by Congress accordingly."

(3.) Pablo Delgado, who testified in person before the surveyor general, was one of the attending witnesses who were present at the livery of seisin and subscribed the original act of juridical possession (*Transcript*, fol. 73), the fifteenth of December,

1845. He belonged to a Mexican family then, and always since, of most respectable standing in the community. He was the uncle of our witness, Francisco Delgado, a gentleman of the highest character, now, and for a long time, employed in the office of the United States Attorney for the Court of Private Land Claims (*Ib.*, fols. 44, 45). Francisco Delgado, proved that Pablo Delgado died about 1871, and that Pablo Delgado's first wife was a daughter of Gervacio Nolan, by whom Delgado had two daughters, who are among the grantors of the appellant Whitney.

(4.) William M. Tipton, another witness called by us on the trial, is a special agent of the Court of Private Land Claims, detailed for service in the office of the United States Attorney for that court. He testified (*Transcript*, fol. 42) that he is familiar with the signatures of Manuel Armijo and Antonio Sandoval, and he gives it as his opinion that the signature of Manuel Armijo on the granting decree, and the signatures of Antonio Sandoval on the petition for the grant and on the conveyance to Gervacio Nolan are all genuine. Mr. Tipton adds that, according to such information as he had derived from the archives of New Mexico and from conversation with people in the Territory, Antonio Sandoval was at one time "a man of great prominence and considerable wealth in New Mexico, and at one period he was a prefect." Concluding, Mr. Tipton says: "He lived, I think, until early in the '60's, if I remember rightly, according to some documents I saw at Barelas, and at the time of his death left a very large estate, for those times, the probate of which is in the records of Bernalillo county."

(5.) In litigation in the Court of Private Land

Claims, and in this court on appeal, the government, without conceding the validity of our title, has given sanction to our claim of its authenticity and good faith by invoking the action of the Mexican officials in creating it as persuasive evidence to show that, notwithstanding the incipient Spanish proceedings towards a grant of certain lands to Bartolomé Baca, those proceedings were abandoned and treated as nugatory, and the affected premises were accordingly recognized as vacant public domain before the year 1845, because grants before and since that year, including ours, were in part carved out of these lands. Indeed, our grant is almost wholly composed of the excess which the alcalde who put Baca in possession under his incipient claim, irregularly undertook to add to the area for which Baca had petitioned the acting Spanish governor, Melgares. (*Vide Bergere vs. United States*, 168 U. S. 66, and the record and briefs in that case.)

Perhaps the crude characterization of the lands in Sandoval's petition as being vacant, and "in a condition of *mortmain (á manos muertas)*," was induced by the fact that they were abandoned lands.

(6.) While, in view of the *possessio pedis* created by the delivery of juridical possession (a judicial act of great import and solemnity under the Spanish and Mexican law, as demonstrated by this court in *Ainsa vs. United States*, 161 U. S., at pages 230 to 233, and many other cases), and the uncontradicted and unsuspicious chain of facts and circumstances which establish the authenticity and good faith of our just title (*"justo titulo adquirido"*), it was an act of supererogation for us to invoke the notorious fact that the Mexican archives were despoiled on several occasions, and especially by high

federal officers, such as Governor Pile, we nevertheless proved by Mr. Tipton (*Transcript*, fols. 41, 46) that, although he had been connected with the surveyor general's office in New Mexico for the greater part of sixteen years, since the spring of 1876, and ever since then in the office of the United States Attorney for the Court of Private Land Claims, he had never seen in the archives of the government any record by Armijo, or by his secretary, of the grants made by him or signed by him; that, if such record existed in the archives during his said official employment, he would probably have encountered it in his examination of the archives; that he knew nothing about the condition of the archives, prior to the spring of 1876, of his own knowledge, except that a record book, commonly known as book letter B, had disappeared about 1879 or 1880, and, so far as he knew, had never been returned (*Ib.*, fols. 47, 50); that he could not answer positively that he had ever examined that book enough to tell of its general character (*Ib.*, fol. 47); that he "understood that it was a book which had been kept after the acquisition of this Territory by the United States, in which documents in relation to lands were recorded, in compliance with some provision of what was known as the Kearny Code, which required persons to present their documents to land to the recorder to have them copied in books and preserved" (*Ib.*); that he could not give the dates covered by that book B (*Ib.*, 50); that he had "heard it stated that some documents belonging to the archives of the Territory were destroyed in the year 1837, at the time of the revolution which resulted in the death of General Perez, who was then the governor of New Mexico," and had "also heard it stated that

during the administration of Governor Pile, who was governor somewhere about 1870, some of the archives of the Territory were destroyed by fire and some were sold to different persons and scattered about the town" (*Ib.*, fol. 48); that during the time of his connection with the office of surveyor general one book (letter C) was restored to that office (*Ib.*, fols. 48, 50); that it pertains to land grants and other documents affecting land titles; that, on investigation, the conclusion was arrived at that book letter C "had probably been disposed of by Governor Pile at the time he disposed of other papers belonging to the Territory" (*Ib.*, fol. 49); that "it was a book in which documents in regard to land were recorded," and the same kind of book, he understood, as the one that disappeared years ago from the surveyor general's office, and which had not been recovered (*Ib.*, fol. 49); that he had no recollection of ever having seen any other papers affecting the title of the Estancia grant than those produced on the trial, and, to the best of his knowledge, there are none (*Ib.*, fol. 49); and that he had never seen the "government book" referred to in old Spanish grants as containing notes of grants made, and he did not believe it to be in the archives of the surveyor general (*Ib.*, fol. 56). He further testified (*Ib.*, fols. 51, 52, 53) concerning a book called Vigil Indexes, believed to have been prepared, under the American provisional government, prior to 1851, by Antonio B. Vigil and Domingo Fernandez, under the direction of Donaciano Vigil, who at that time was secretary of New Mexico, and had charge of the archives and all papers. Mr. Tipton judged, "from having examined the index, it would be impossible to tell" how many documents the index purports to contain,

and he added that "there are certain documents that are described as being marked with certain numbers, and from the description of them it is evident that the one number applied to a large number of papers, or more than one paper, at any rate, to which the same number was given;" that, as to the character of the documents, as a rule, contained in these bundles, in some cases the description is perfectly plain; in others it is not. Certain cases simply state on the back so and so, containing documents in relation to such and such matter, not stating how many documents; that he had gone over the index in a general way—gone over that portion referring to grants a number of times; that, as to the number of "numbers or bundles" contained in that index, he could not tell "without a very careful examination, on account of the peculiar numbering;" that the first impression he got of it was "that there were ten or twelve thousand different numbered papers, but upon examining it very critically" he came to the conclusion there were less than that; that "the numbering is not consecutive through the book;" that "it would require a very critical examination to form an accurate opinion about that;" that he could not state positively that he ever discovered anything referring to the existence in the archives of a record or paper in relation to the Estancia grant; that he did not remember that he had; that it had been a long time since he had examined the book, and then it was not with a view to that particular case, so that he could not state positively; that he could only do that by going over that portion of the index that refers to grants; that there are probably five or six hundred entries in reference to grants; that in the office of the surveyor general there are numerous grants that

Governor Armijo made—not only entries in books bound together, but original documents left in the archives, purporting on their faces to be original grants of land, distinguishing between documents filed there from private hands and documents that have always been in the archives, so far as the records show; that he did "not have reference to documents that have been produced from private hands and filed by them in various cases," but to those "that constitute the archives proper;" that he had "never seen a record, in the sense of a book, containing grants, or memoranda of grants, made by Governor Armijo, but as to whether there are any grants purporting to have been made by him among these papers which are called archives, in the surveyor general's office, in distinction from private land claims filed there," he was not perfectly certain, although he did not recollect ever having seen any such; that, if there were such a document among the archives, it is possible he "might have seen it and forgotten it;" that he had seen several books "containing entries of Armijo's official acts as governor;" that his impression was that they were in the Territorial library; that he knew there were some there; that he did not remember "whether any of them cover the period of 1845 and the period of 1846;" that, according to the custom of the office, if a grant, or act of possession, or other such paper, had been committed to the custody of the Government under the terms of the Kearny Code, prior to 1854, and remained in such custody, that document, although coming from private custody prior to 1854, would now be regarded as an archive of the Government (*Ib.*, fol. 58); that he could not state whether or not the Vigil Index refers to any bound book, but that

"it does refer to many single documents and that it refers to some *legajos*, or bundles of documents, and that, in other instances, it refers to apparently what would be smaller packages than were called legajos, consisting of a number of papers referring to the same thing" *(Ib.*, fol. 58); that he did not think "it was the custom of the officers in charge of the archives, in making up the Kearny Code records to endorse upon the instruments when they were presented for record the date at which they had been filed" *(Ib.*, fol. 60); but that he thought "it was the custom, though, to endorse upon them the date upon which they were recorded." *(Ib.*, fol. 60.)

(7.) We also put in evidence *(Transcript*, fols. 61, 100) the testimony of Ira M. Bond, a witness called by the government on the trial of the Cubero case, and whose testimony, as well as other important evidence on the subject of the spoliation of the archives, is fully summarized by Mr. Justice Shiras in his opinion in *United States vs. Chaves*, 159 U. S. 452, at pages 462, 463, to all which we pray the attention of the court on this hearing.

NOTE.—Among the witnesses sworn in the Cubero case, and whose testimony is summarized by Mr. Justice Shiras, at page 462 (159 U. S.), was Mr. Tipton. The opinion states:

> "The claimants also called as a witness William M. Tipton, who had been employed for several years in the office of the surveyor general of the Territory of New Mexico, and had charge of the Spanish and Mexican archives. He testified that the books and records in that office, purporting to contain the registry of land grants made by the Spanish and Mexican governments, prior to the time the government of the

United States took charge, are in a disconnected, fragmentary form, and that one of the most important books, containing a record of grants made by the Spanish and Mexican governments, is missing, and is supposed to have been stolen. He also stated that there was not in the surveyor general's office any index of the dates, list of original expedientes, or warrants of title to Spanish and Mexican grants."

The opinion continues (page 462):

"The evidence was adduced to sustain the allegation in the petition that the governor and chief alcalde delivered to the settlers a duplicate of the granting decree and of the act of juridical possession of the chief alcalde in the premises, and placed the originals of said decree and act in the Mexican archives at Santa Fé, and that said originals, with a great part of other valuable archives of the Mexican government, although once in the custody of the United States after the treaty of Guadalupe Hidalgo, were negligently destroyed or lost."

And, at page 463:

"In view of this large body of uncontradicted evidence, we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations of their petition." * * *
"There is ample evidence from which to find that these settlers were put in juridical possession under a grant from the governor of New Mexico, who, under the laws then in force, had authority to make the grant."

As strong corroboration of these data on the subject of the said spoliation, we cite the following,

from the opinion of the court in *Victor de la O vs. The Pueblo of Acoma*, 1 N. M. 226, 236, decided at the January term, 1857, of the Supreme Court of New Mexico, which involved a resort to chancery to compel the surrender of a Pueblo Indian title-paper, issued by one of the viceroys of New Spain, viz.:

> "We do not deem it irrelevant to remark that the abstraction from the archives of this territory of pueblo titles at a period not very remote has become a matter of general notoriety from their nature and importance, and from their diffusion throughout the territory, and the frequent attempts at extorting money from the pueblos by means of these documents. We feel authorized to allude to the fact as one that has assumed the dignity of an historical event. Perhaps personal acts at a period when the political power of Mexico passed to the United States, in this country, and before the archives were possessed by the new power, could fully explain how the Pueblo titles became floating upon the revolution of that day."

Mr. Bandelier, the archæologist, in his published works, has several times made regretful and indignant reference to the spoliation of New Mexican archives, and Mr. Bancroft, in his work on Arizona and New Mexico (Vol. XVII of his series), says, in his bibliographical note at page 19:

> "Naturally, archive records are here as elsewhere to be regarded as the foundation of history; but in this case these records must be sought from a variety of sources, of which the archives proper—that is, the documents preserved in government keeping at Santa Fé, and cited by me as *Archivo de Sta Fé*, M. S.—are not the most fruitful or

important. The earliest records, those preceding 1680, were almost entirely destroyed in the revolt of that and the following years. The bulky accumulations of 160 later years, never adequately cared for in Spanish and Mexican times, were most shamefully neglected under U. S. rule. Hundreds of documents were lost or destroyed from time to time, until about 1870, during the rule of Governor Pile, when the remaining archives were removed from the *palacio* and sold for wrapping paper, only about one-fourth being recovered. See N. Mex. newspapers of 1870, extracts from which were published in pamphlet form as *N. Mex. Destruction of Spanish and Mexican archives in New Mexico, by United States Officials*, n. p. (1870), 8vo. 4p. After several years more of neglect and ruin, the fragments were at last gathered up, properly cared for, and roughly classified in 135 pasteboard boxes, by Judge Samuel Ellison, who has been their keeper as territorial librarian since 1881, and who has kindly afforded me every facility for consulting the treasures in his care. Thus it will be seen that the *Arch. Sta Fé*, though immensely valuable in the aggregate, and containing many important documents, is very imperfect, fragmentary, and utterly inadequate to the forming of a complete record of the country's annals in any phase. It is vastly inferior to the *Archivo de California*, so extensively cited in another volume of this series."

We respectfully request the court to peruse the entire article from which the foregoing citation is made.

In *United States vs. Wiggins*, 14 Pet. 334, the original grant in question not being in the Florida

archives, and only a certified copy being produced, the court treated the latter as *prima facie* evidence, in the absence of suspicious circumstances, and added (page 348):

> "Furthermore, the presumption that the original memorial and concession, supposed to have been on file in the government secretary's office, have been lost or destroyed, is very strong. After the papers were taken possession of in 1821 by the authorities of the United States, they were almost abandoned, in an open house, subject to the inspection and depredation of every one; many of the files were seen untied, and the papers scattered about the room; the doors and windows of the house being open. There can hardly be a doubt that some of the papers were destroyed or lost. Nothing is therefore found in the condition of the office to rebut the *prima facie* presumption furnished by the secretary's certificate, as might be the case had the papers been kept in the proper care, and especially had the concessions been numbered, and no number been missing."

12. We called on the government (*Transcript*, fol. 54) "to produce from its own custody all archives in its possession showing the acts of Manuel Armijo as governor during the year 1845, and particularly all acts pertaining to grants in which, according to the terms, Antonio Sandoval was a party or concerned;" also "to produce the commission under which Manuel Armijo was acting as governor in 1845, and also the records in its possession and commissions, concerning the office of Baca y Ortiz, as justice of the peace of the Real del Oro, at the date of the act of possession tendered in evidence;" also

"the records of grants made by authority of the supreme executive of Mexico in the year 1845, and particularly the records immediately pertaining to the grants here in question."

But the government (*Ib.*, fol. 55) was content to refer us to our statutory right to compel the production of relevant public papers.

NOTE.—By its amended answer, the government put in perfunctory denials of the petition, comptroller's certificate, grant and juridical possession (*Ib.*, fols. 30, 31), and "all material allegations not hereinbefore answered" (*Ib.*, fol. 38).

It did not even admit, unless by implication, our allegation of the spoliation of the archives or our allegation of their former contents. (*Ib.*, fols. 9, 10, 11.)

However, in view of the manifest good faith of our title, the authenticity of our papers, the delivery of juridical possession, and the absence of any suggestion of forgery, spuriousness or other fraud, coupled with the fact that the grant was made by the instrumentality of the appropriate agent of the supreme executive under the central system, the condition of the archives was not necessarily in issue, although we were desirous to have all the light shed upon our title which could possibly be shed after the lapse of more than half a century since it originated, and after the death of Antonio Sandoval and his cotemporaries.

The United States, having waived its sovereign immunity from litigation and consented to come down to the level of private citizens in a litigious contest in a court of justice, was bound on the trial

by all the usual rules of evidence (See *The Siren*, 7 Wall. 152, 154, 159). If there were in governmental custody any relevant archives, the government, "from the nature of the action," had sufficient notice to produce them (1 Gr. Ev., § 561, third case classified), and its failure to produce what, if any, it had, or to show from the archives anything, either positive or negative, to cast suspicion on our title, or tend to countervail the presumption fairly attending our "*justo titulo adquirido*" (as was always done in the California cases when the integrity of a grant title was impugned), leaves that presumption in its *prima facie* importance as a safeguard of our ancient right and possession.

Our grant is, on its face, absolute in terms, and "a just title acquired," on a most serious valuable consideration moving to the nation (*Ib.*, fol. 76), and the following customary act of possession, although probably unnecessary in the case of so complete and perfect a grant, was an *adjudication* in its support, and was expressly issued "in testimony thereof, in all time to come," to "serve him [the grantee] as formal title." (*United States vs. Pico*, 5 Wall. 536, 539, and *Malarin vs. United States*, 1 Wall. 282, 289, both cited in *Ainsa vs. United States*, 161 U. S. 230, 231.)

Such a title, when not pending in the political department, is available in the ordinary courts of the land (*Ainsa vs. New Mexico & Arizona R. R. Co.*, 175 U. S. 76, 86), and, in its maintenance against a defendant, it carries with it the same presumptive validity as a British or Spanish colonial grant (*United States vs. Peralta*, 19 How. 343, 347; *Arredondo case*, 6 Pet. 727; *The People vs. Livingston*, 8 Barb. (N. Y.)

253, at pages 277 to 281; *Bogardus vs. Trinity Church*, 3 Sand. (Ch) 633, 784).

We show below, in the course of our argument, that our title is in the same category with such colonial titles, and not in the category of titles emanating from authorities limited in their powers by the terms of specific statutes.

13. The court will notice that this cause was tried with unusual frankness and courtesy on both sides, with the joint purpose to avoid incumbering the record with unnecessary verbiage (*Transcript*, fols. 61 to 67), and to bring up sharply the comparatively new question as to the effect of the institution of the central system of government and the legislative and executive practice thereunder upon the construction of absolute titles created during that period.

Hence we did not go at length into the industrial uses of the property involved; but, if the court deems such matters important, notwithstanding its recent decisions declining to consider possession since the American occupation (*Crespin vs. United States*, 168 U. S. 208, at page 218), we offer to show that Antonio Sandoval, enjoying the actual possession into which he was judicially inducted on the fifteenth of December, 1845 (*Transcript*, fol. 78), devoted the land to ordinary ranch uses and the production of salt, so far as was consistent with his public duties during the ensuing war, up to the time that he conveyed the property to his nephew, Gervacio Nolan; that the latter, personally and through his lessee, Rufus Beach (*Ib.*, fol. 87), enjoyed the property until his death in 1858, when the title vested in his widow and children and grandchildren, some of whom were infants, and that, after the acquisition

of the property by the appellants (*Ib.*, fols. 91, 97), the latter used it extensively as a cattle ranch, under ninety miles of fence, without interference, except as to the occupation of two springs, squatted on long after the death of Gervacio Nolan, and while our title was pending before the surveyor general, and expended very large sums of money on improvements, taxes, etc. For instance, after ejecting the squatter, McAfee, about eighteen years ago, under the ruling of the New Mexico District and Supreme courts in *Whitney vs. McAfee*, 3 N. M. 37, the appellants paid the defendant liberally for his improvements and cattle.

The objections interposed by the government to a confirmation of our title may be summarized as follows:

> 1. "An objection to the introduction of the original title papers and certified copies representing them, for the reason that they are produced from private hands and do not purport to be *testimonios*, and do not show in themselves, nor has any evidence been introduced, that their attempted disposition was ever made a matter of record in the archives of the department of New Mexico, nor is there any connection shown that the archives have been lost or destroyed." (*Transcript*, fol. 45.)

NOTE.—The "original title papers" referred to have undoubtedly been in the custody of our government at least *forty-five years* last past, and they still remain in that custody. It was from that custody that we produced them on the trial. They are the same "original title papers" to which the surveyor general refers in his opinion, dated January 4, 1873,

as being "the original documents in Spanish," and as being "genuine beyond all doubt." (*Transcript*, fol. 89.) It is now impossible for us to aver whether they are the very "originals" which were deposited in the archives at the time of the grant and act of possession, or are duplicate "originals," which (according to the custom) were delivered to the grantee as evidence in the nature of letters patent. They *may* be duplicates which were handed to the grantee in December, 1845, to keep as muniments, and, being such, they *may* have been confided to the surveyor general by Gervacio Nolan when he presented his petition to that official July 12, 1855. On the other hand, they *may* be part of the archives of Armijo's time which afterwards were turned over to the "register of lands" under the Kearny Code, and recorded in the missing book "B." (*Kearny Code*, *supra*, § 4.)

The petition and grant, or the official duplicates thereof, were certainly in the hands of the magistrate at the very time and place of the livery of seisin, for he then and there exhibited them to the grantee's representative on the ground. (*Ib.*, fols. 73, 78.) It was as evidence of that livery of seisin that the magistrate executed and delivered to the grantee a duplicate of the instrument, known as the act of juridical possession. (*Ib.*) On the back of that instrument, as it remains in the custody of the government, is endorsed: "No. 2 C. File 10. Posecion de terreno para hacienda en favor del Sr. D. Antonio Sandoval. Año de 1845." And it is at the foot of that instrument that we find the words: "Registrado en el libro letra B, folio 166 y 167: lo que certifico para constancia. Santa Fé, Noviembre 17, de 1849.

"DONACIANO VIGIL [Rubrica],
"*Registrador.*"

It was equally the duty of the register of lands to make this record, whether he found the retained original of this document in the archives or received it for record from the grantee or his assign. (*Kearny Code, supra*, § 4.)

The other parts of the objection are fully answered by the evidence of destruction and loss of archives. (*United States vs. Chaves*, 159 U. S. 452.)

> 2. An objection "that the genuineness of the signature of the alcalde to the act of possession has not been established, and, in addition, the Spanish title papers, consisting of the petition of Antonio Sandoval, the marginal order or decree by Governor Armijo, and the act of possession by the alcalde, are not in the proper custody, nor is their absence from the archives and in the custody of the plaintiffs accounted for, if they ever had been in the archives."

NOTE.—It was a mere *lapsus linguæ* on the part of counsel for the government to refer to the original papers as being "in the custody of the plaintiffs." We had in our possession only a certified copy, and it was the government that, at our request, produced the originals on the trial. We expressly asked "to substitute the certified copies, which are already in evidence, so that the *originals* may be withdrawn at the convenience of the Government"—that is, returned to the surveyor general's office, whence they came for the purposes of the trial. (*Transcript*, fol. 45.)

As to the signature and office of "the alcalde"

(or, rather, *juez del paz)*, José Baca y Ortiz, they were amply proved by Pablo Delgado, one of his attending witnesses. *(Ib.*, fol. 86.) But this proof was unnecessary, in view of the ancient character of the documents. We have already sufficiently answered the remainder of this objection.

3. To lay a foundation for claiming, if the colonization law of 1824 is to be regarded as continuing operative in New Mexico under the central system, and as relevant to such a grant as ours, that Antonio Sandoval had already received gratuitous grants to the limit of his capacity to hold under that law, the government put in evidence, over our objection *(Transcript*, fols. 62, 63), certain proceedings of the territorial deputation of New Mexico in November, 1824, upon the petition of Doña Ursula Chaves, wife of Antonio Sandoval, in behalf of her absent husband, for a league of land now known as the Agua Negra grant, which resulted in a grant of the land to Antonio Sandoval by the said deputation at its session of the nineteenth of November, 1824, and the delivery of possession on the first of the month following *(Transcript*, fols. 62, 121, 127); also the proceedings for confirmation of that grant, taken before the surveyor general on a petition filed the twenty-first of October, 1856 *(Ib.*, fol. 133), which date, it will be noticed, was upwards of fifteen months subsequent to the filing before the same officer of the petition for confirmation of the Estancia grant *(Ib.*, fol. 89), and also the confirmation of the said Agua Negra grant, under the report No. 12, by act of Congress of June 21st, 1860, 12 st. 71. *(Ib.*, fol. 62);

Also, a petition filed before the surveyor general by Antonio Sandoval, by his attorney, claiming the

Bosque del Apache tract, under a grant made by Governor Armijo, dated November 24, 1845, and juridical possession delivered March 7, 1846; the report of the surveyor general thereon, July 20, 1859, and the confirmation thereof, under the report No. 35, by the said act of Congress, 12 st. 71 (*Ib.*, fols. 64, 134, 144, 145);

Also, the surveys and patents of the said Agua Negra and Bosque del Apache grants, from which it appears that the latter was confirmed for more than eleven square leagues.

NOTE.—The Agua Negra grant, having emanated from the provincial deputation, after the enactment of the colonization law of 1824, and before the formulation of the regulations of 1828, was a nullity, according to the decision of this court in *Hayes vs. United States*, 170 U. S., 637. Its confirmation by our Congress in 1860, upon an *ex parte* application of those interested, could not affect the heirs or assigns of Gervacio Nolan, who had claimed the Estancia adversely ever since July 8, 1848, under Antonio Sandoval's conveyance of that date (*Transcript*, fols. 80, 82), and whose proceedings for its confirmation had been pending ever since July 12, 1855 (*Ib.*, fol. 89)

The Bosque del Apache grant was in equitable subordination to the Estancia. The proceedings for its examination and confirmation were *ex parte*, and the act of confirmation was a mere quitclaim, not intended to prejudice strangers. Although the concession bears date November 24, 1845, it required the petitioner to "present himself to the justice of the peace of Socorro, who will place the petitioner in possession and execute the proper deeds."

(*Transcript*, fol. 141.) The juridical possession was not delivered until the seventh of March, 1846 (*Ib.*, fols. 141, 142). The papers indicate that (whatever law applied) the Bosque del Apache was intended as a *gratuitous* grant in colonization, for the magistrate admonished the grantee on the ground (*Ib.*, fol. 142) that "he should comply with all the rules and regulations (reglas y estitutos) provided for other *colonists*," and the grantee acknowledged "that he was duly informed of the above conditions" [in the original (*Ib.*, fol. 138), "á lo cual estando entendido de todo lo que se le advierte"]. On the other hand, the Estancia was absolute and immediate in its terms, and for a valuable national consideration. Although dated the seventh of December, 1845, it was either then consummate *ipso facto*, or, at least, it became consummate on the fifteenth of the same month, on the delivery of juridical possession (*Ib.*, fols. 73, 78), upwards of eighty days before Antonio Sandoval became legally vested with the Bosque del Apache. Hence, neither Sandoval, nor his heirs, nor the United States, could, in face of the conveyance of the Estancia to Gervacio Nolan on the eighth of July, 1848, and the solemn terms of that conveyance, and the institution of proceedings for the confirmation of the Estancia by the filing of the petition therefor in the surveyor general's office on the twelfth of July, 1855, do anything by subsequent *ex parte* action, tending to the prejudice of the Nolan title.

So far as the *equity* of the case is concerned, Nolan had the superior equity in 1848, and our government had ample notice thereof, long before the Bosque del Apache grant had been brought to its attention.

Moreover, as we contend, the limitations of the

colonization law of 1824 did not obtain in New Mexico under the central system.

4. The final objection of the government (*Transcript*, fols. 65, 66) is that the proviso contained in an act of Congress, entitled "An act granting to the heirs of Gervacio Nolan certain lands in the Territory of Colorado," approved July 1, 1870, 16 st., 646, whereby eleven square leagues, to be carved out of a larger tract claimed, were confirmed to the said heirs, operated to divest and destroy all title to the Estancia tract.

The said *proviso* is in the following words (*Ib.*, fol. 161):

> "*Provided*, however, that, when said lands are so confirmed, surveyed and patented, they shall be held and taken as in full satisfaction of all further claims or demands against the United States."

NOTE.—The history, meaning and effect of this proviso are admirably and convincingly discussed by Hon. Frank Springer, in the language which we quote, from one of his briefs, under our "Second Point," *infra*. Manifestly, the proviso was introduced to "exclude some possible ground of misinterpretation" of the general enactment (Story, J., in *Minis vs. United States*, 15 Pet. 423, 445), lest, at some future time, it might otherwise be asserted that the confirmation of the eleven square leagues was not a final rejection of the remainder of the large area then claimed in Colorado. The restrictive effect of such a proviso is illustrated by the history of the grant known as Las Animas, which came under the consideration of Mr. Justice Brewer, when

Circuit judge, in the case of *United States vs. The Cleaveland Cattle Co.*, 33 Fed. 323. By an act of Congress, approved June 21, 1860, 12 st. 71, the Las Animas title, under its report number 17, was included in the list confirmed, but with the proviso "that the claim number 17, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of the claimants." Judge Brewer said (*Ib.*, page 327): "The fact that the act contains no express denial of the validity of the claim beyond the twenty-two leagues is immaterial. This confirmation as to part is equivalent to a denial by Congress of the balance," etc. But he added (*Ib.*, page 328): "It is doubtless true that the action of the political department is not conclusive upon the courts. It is their duty to construe treaties, to determine rights, and, if there be any vested rights of property which the political department of the government refuses to recognize, such refusal will not prevent recognition and enforcement in the courts. At the same time this action, though not conclusive, is very persuasive; it stands upon a higher plane than the mere construction by one party of his contract and of its terms." Then the learned judge proceeded to discuss the Mexican title papers involved, and to hold, precisely as Mr. Benjamin had done, in the report of the Senate committee on the claim, that the grantees had not asked for the entire area described in their petition to Governor Armijo, but for "a tract to each of them" out of that general area. See also *The Las Animas Grant Co. vs. United States*, No. 65, October term, 1900, of this court, decided December 3, 1900.

That very litigation shows what was intended to be avoided by the proviso in the Nolan case. The

claimants could either abide by the construction of their title by our government, or decline the benefits of the act of confirmation. At the same time, that enactment concerns only the land immediately under consideration. The proviso was not intended to divest their title to any property, whether government bonds, independent executory claims, or landed estate, in their possession, outside of the subject-matter of the enactment itself; nor could such an effect be constitutionally sanctioned.

It would be especially irrelevant to the office of this proviso to construe it as operating on a just title (*"justo titulo adquirido"*) vested in Antonio Sandoval at the date of the treaty.

Following are the main propositions of our argument, which we shall take up and elaborate *seriatim:*

First.—Our title papers are evidentially established.

Second.—The proviso annexed to the act of confirmation of the Nolan grant in Colorado, to the extent of eleven square leagues, must be confined in its operation to the claim which is the subject-matter of that enactment.

Third.—The numerous decisions relating to grants in California, purporting on their face to be founded on the colonization law of 1824 and the regulations of 1828, are not pertinent to the present case, because, owing either to ignorance of the law of April 4, 1837, repealing the old colonization system (*Reynolds*, p. 35), or its non-promulgation in California, or the rebellious opposition of that department to the central system, or secret instructions from the Supreme Executive, the old customs and

usages in the granting of lands continued in that jurisdiction.

Fourth.—The Estancia grant was made at a time when New Mexico was living in subjection to the central system of government, and Manuel Armijo, as Governor and Commandant General of that department, was the trusted minister and agent of the *quasi* dictatorial Supreme Executive of Mexico, and duly acted as such in making the grant in the name of the Supreme Government, and was not restricted by any prescribed rules or limitations.

FIRST POINT.

Our Title Papers Are Evidentially Established.

At first, this court approached the consideration of California titles claimed under Mexico with a generous and unsuspecting magnanimity, subjecting them only to the test of the ordinary rules of evidence, and assuming good faith rather than fraud to attend them. But this judicial confidence was rudely shocked by the discovery that Pio Pico and other corrupt persons who had held the office of governor of Upper California, under Mexico, were so base as to lend themselves, after the American occupation, and even after the proclamation of the treaty of peace, to the purposes of vile conspiracies hatched to defraud our government out of valuable parts of the newly acquired public domain, and involving the fabrication of pretended grants bearing the *actual, genuine* signatures of ex-governors and other ex-officials of Mexico, but antedated as of the very time when they had held their former Mexican offices. In face of the painful experience of abused judicial confidence in several cases in which this court and

the tribunals below had been imposed on by these abominable frauds, a resolution was adopted with a view to balk further attempts at such imposition, and this resolution found its full expression in the case of *Luco vs. United States*, 23 How. 515, wherein a pretended grant was adjudicated to be most glaringly forged and fraudulent. The Court, speaking by Mr. Justice Grier, wound up its scathing opinion in that case with the following impressive sentence (*Ib.*, page 543):

> "In conclusion, we must say that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claimants is false and forged; and that, *as an inference or corollary from the facts now* brought to our *notice*, it may be received as a general rule of decision, that no grant of land purporting to have issued from *the late Government of California* should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente or some part of it be found on file among the archives, where other and genuine grants of the same year are found; and that, owing to the weakness of memory with regard to the dates of grants signed by them, *the testimony of the late officers of that Government* cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives."

Search of the reports of all the California cases decided in this court, from *Fremont vs. United States*, 17 How. 541, and *United States vs. Ritchie*, *Ib.*, 224, down to *Luco vs. United States*, 23 How. 515, (including in the 18th Howard, *Reading*, p. 1, *Arguello*,

p. 539, *Cruz Cervantes*, p. 553, *Vaca*, p. 556, *Larkin*, p. 557; in the 19th Howard, *Peralta*, p. 343, *Sutherland*, p. 363; in the 20th Howard, *Cambuston*, p. 59; in the 21st Howard, *Sutter*, p. 170, *Nye*, p. 408, *Basset*, p. 412; in the 22d Howard, *Galbraith*, p. 89, *Gonzales*, p. 161, *Pacheco*, p. 225, *Garcia*, p. 274, *Hartnell*, p. 286, *Yturbide*, p. 290, *DeHaro*, p. 293, *West*, p. 315, *Teschmaker*, p. 392, *Pico*, p. 406, *Vallejo*, p. 421, *Dalton*, p. 436, *Fuentes*, p. 443; and in the 23d Howard, *Bennitz*, p. 255, *Rose*, p. 262, *Osio*, p. 273, *Noe*, p. 312, *Alviso*, p. 318, *Murphy*, p. 476, *Pico*, p. 321, *Gomez*, p. 326, *Bolton*, p. 341, *Castellero*, p. 464, *Yontz*, p. 495, *Berreysea*, p. 499) will make it clear that the *Luco* case was the first one in which the court expressly found forgery in the alleged grant papers considered, although its suspicions had been aroused in several prior cases, which, in consequence, were generally remanded for further proof.

The court had not yet declared the policy, uniformly acted on in later cases, of testing claims by the light of its judicial knowledge of the systematic frauds and fabrications prevalent in California, but had construed and examined each collection of granting documents in accordance with the evidence adduced in the particular case to which they related; always bearing in mind the honorable and magnanimous desire of the United States, in the carrying out of treaty stipulations, "to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded." (Per Field, J., in *United States vs. Anguisola*, 1 Wall., at page 358. See, also, the observation of

Grier, J., in *United States vs. Johnson*, 1 Wall., at page 388.)

In the consideration of land titles, originating under an antecedent government, the court has always been regardful of the well-established rules of evidence fairly applicable to the subject, and has construed such titles broadly and liberally, in accord with the spirit of the treaties which protect them, and with the thought and practice of the official authorities concerned in their creation—all which is exemplified by the opinions in *United States vs. Arredondo*, 6 Pet. 691; *United States vs. Fremont*, 17 How. 560; *United States vs. Chaves*, 159 U. S. 452; *Ely's Administrator vs. United States*, 171 U. S. 220, 223, 224.

Nevertheless, and still in accord with its general purpose, the court was bound to take judicial notice of the *matter of fact*, so prominently brought to its attention in some of the California cases, that "the late officers" of the "government of California" were culpable of fraud, forgery and falsehood, in the concoction, after our treaty, of antedated grants, and were further chargeable with perjury before our tribunals in the attempt to impose those spurious instruments on our government. In view of the judicial knowledge of such facts, the court was called on, in every new case found apparently in the same category, to apply the maxim *noscitur a sociis*. In this, the court acted on the principle underlying the general rule of evidence which permits the intent and moral character of a given act, impeached for fraud, to be tested by comparison with contemporaneous like deeds of the same actor, judicially proven to be fraudulent. *1 Gr. Ev.*, § 53; *Stephens' Digest of Evidence*, 2d Am. Ed., p. 49, Part I, Ch. 111,

Art. 12; *Lincoln vs. Claflin*, 7 Wall. 132; *Butler vs. Watkins*, 13 *id.* 456, 464; *Castle vs. Bullard*, 23 How. 172, 186; *Insurance Co. vs. Armstrong*, 117 U. S. 398; *Comm. vs. Russell*, 156 Mass. 196; *People vs. Dimmick*, 107 N. Y. 13, 31.

The kind of evidence appearing in the California cases exhibited, in the language of Stephens, "facts showing system" in acts constituting a course of conduct. In *United States vs. Vallejo*, 22 How., at page 418, Attorney General Black said that that case was confirmed in the court below "before any *organized system* of fabricating land grants in California had become known," and he added: "Until the decree of the Supreme court in Cambuston's case, very little regard was paid to the evidence offered in support of private land claims, and confirmations were made without scrutiny, and sometimes against the manifest impression of the court that the claim was fabricated and false."

But these disgraceful instances of attempts to pollute the course of justice were limited in number, time, place and opportunity. They furnish a record of an abnormal and temporary social condition, and the like are not to be found in New Mexico and other districts of country where land did not tempt cupidity by its value or its scarceness. While a few easily detected forgeries may have appeared in New Mexico land titles, we believe it safe to say that not one case appears of the execution of a grant by a governor of that department after the American occupation. In California, the discovery of gold, in 1849, and the consequent inrush of an adventurous, speculative and covetous population, led to the enhancement of the value of lands along the coast and in other attractive localities, and to the temptation to create antedated,

pretended titles by the crafty use of the *genuine* signatures of corrupt ex-officials. The result was the production of many tainted titles and the generation of an atmosphere of fraud in which the courts could not administer justice without exercising the most extraordinary precautions against fraudulent imposition.

The case of *United States vs. Wiggins*, 14 Pet. 334, is illustrative of the rule applicable to title papers which are free from the blight of origin in the midst of "an organized system of fabricating land grants." In that case, it appeared that the archives had been carelessly kept and many papers had been lost, although the proof was by no means so overwhelming as in ours. No *original* paper was produced, but only a copy certified by Tomas de Aguilar, the governor's secretary. Proof was tendered by the government that Aguilar had forged other grants; yet the court said (14 Pet., at pages 347, 348): "The record shows why such vigorous exertions were made, either to reject or to destroy the force of Aguilar's certificate. The attorney for the government offered to prove by William G. Davis that Aguilar, just before the delivery of the province was made to the United States, offered to forge a grant in favor of the witness for a tract of land; and the attorney also offered to prove by William Levington that, about the same time, Aguilar offered to forge, or did actually forge, under the signature of the former governor, White, of that province, a grant of land in favor of the witness, which evidence the court rejected, and, we think, correctly. Aguilar was not introduced as a witness; but the proof offered to establish upon him forgery and fraud in other instances, so as to destroy the credit of his certificate

in this. The secretary may have been honest and faithful in the discharge of his duties in 1815, and grossly the reverse in 1821; and, although any number of frauds should be established upon him, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with other frauds. (4 Peters, 297.) If there had been a forgery in this instance, it is probable it would have been brought to light at the time the survey was made; the making of which is a controlling fact with this court, coming in aid of the certificate of Aguilar. For it must be admitted that if the unsupported certificate had been brought forward, and the claim for the first time set up under it, in July, 1833, eighteen years after it bears date, that it could not have furnished any foundation for a decree, or been evidence of title worthy of credit. The lapse of time, the silence of the claimant, and her failure to have presented it for confirmation, would, under the circumstances, have been conclusive objections to its credibility. But the existence of the claim in 1821 is rendered certain by the return of the surveyor general, and before the American tribunals it has been steadily pursued."

In our case we proved, by the deposition in 1861 of Pablo Delgado, of most respectable family, that he was present at the delivery of juridical possession, December 15, 1845, and that the signatures to the juridical act are authentic. (*Transcript*, fols. 86 and 44.) He was one of the attending witnesses. (Act of juridical possession, *Ib.*, fol. 73.)

As we have seen, the opinion in the Luco case was written by Mr. Justice Grier; yet that great jurist dissented in strong and eloquent terms from what he regarded as the injustice done to General

Vallejo by the technical decision in *United States vs. Vallejo*, 1 Black, 541. See page 555 *et seq.*

And Mr. Justice Wayne, in the same case, joined in the dissent, adopting the opinion of Judge McAllister (*Ib.*, page 558), although it was Mr. Justice Wayne that had written the opinion in *Fuentes vs. United States*, 22 How. 443.

In conclusion of this reference to the genesis of the California doctrine of suspicion, we have to say that, in nearly all the suspected cases there was no pretense of *juridical possession*, and they involved in general only inchoate titles, professing to have originated under the law of 1824 and the regulations of 1828, and the court, as a court of equity, in effect ruled that the hands of the original claimants were unclean, because their papers were tainted with suspicion of crime; being as astute to ferret out and denounce fraud in those cases as it was quite recently in the case of *United States vs. Ortiz*, 176 U. S. 422, 426, 427.

And yet, even while scrutinizing with jealousy all California cases arising after the discovery of the frequent frauds to which we have above referred, the court was quite solicitous to avoid wronging by a technicality any claimant whose title bore the signs of honesty and good faith, although it might be in some respects informal; just as the court, in all New Mexico cases from the Court of Private Land Claims exhibiting no circumstances of suspicion, has, to the utmost of its jurisdiction, supported Mexican titles bearing the impress of good faith, notwithstanding evidential difficulties arising from the lapse of time, the death of witnesses and the spoliation of the archives; as appears from *United States vs. Chaves*, 159 U. S. 452.

In our case, there has never been suggested even a suspicion of bad faith.

1. The encomium of Mr. Justice Grier on General Vallejo might well be applied to Prefect Sandoval. (*1 Black*, page 558.)

2. Sandoval received actual possession of the estate, under the solemn rites attending the adjudication of his title on the very ground; and that possession must be presumed to have continued. (*1 Gr. Ev.*, § 42; *Lawson Presump. Ev.*, p. 209; *Brown vs. King*, 5 Mete. 173; *Magee vs. Scott*, 9 Cush. 148; *Lewis vs. Payn*, 4 Wend. 429; *Coleman Co. vs. Rice*, 105 Ga. 163.)

3. He and his grantee, Nolan, and the heirs and assigns of the latter, have always been "open and above board," as well as diligent, in the disclosure and record of their muniments of title.

4. The surveyor general, commissioned by our government to inquire into the "origin, nature, character and extent" of our title and to report "his decision as to the validity or invalidity" of the same, solemnly, under his official oath, reported it to Congress as based on "original documents in Spanish which are *genuine beyond all doubt*." (*Transcript*, fol. 89.)

5. The government itself, under even more serious circumstances, has vouched for the genuineness of our title papers; for, as will appear by the record of the Bartolomé Baca case (*Bergere vs. United States*, 168 U. S. 66; the transcripts of which are No. 279 (15,913), filed May 23, 1895, and No. 299 (15,948), filed July 16, 1895), they were put in evidence (from the government files) in that case as "the grant and translation thereof made in 1845 to Don Antonio Sandoval, sometimes called the Estan-

cia grant." (*Bartolomé Baca Transcript*, fols. 92, 93; also 142, etc.)

This introduction in evidence was qualified—even the words "pretended grant" being employed—so as to indicate that the government's counsel intended, when the Estancia grant should come up for hearing, to reserve the right to question its operative validity. Nevertheless, it is impossible to conceive that the government would put in evidence the Estancia grant as made in 1845, to show the probability that the Bartolomé Baca pretension had no legal standing in that year, if the theory was indulged by the government that the Estancia grant was not made at its date, December 7th, 1845, and juridical possession delivered on the fifteenth of the same month.

On the contrary, the good faith of the government in the introduction of the Estancia grant papers and other grant papers of the same period from its own files, as evidence against the Baca claim, is made manifest from the following excerpt from the government's original statement and brief filed here on the argument of that case. (See pages 28 and 29 of the brief filed in Nos. 279 and 299, October term, 1896):

"ANTONIO SANDOVAL GRANT, 1845.

"On December 5, 1845, Antonio Sandoval, a very prominent man in the Territory, petitioned the governor of the Territory for a large tract of land known as the Salt Lakes tract, stating that he makes the petition because the land is vacant and in a condition of mortmain, and that it will prejudice no third party. (R., 88-89.)

"On December 7, 1845, Governor Ar-

mijo, in consideration of the services of Sandoval, which he recites, grants him the land according to the boundaries that he asks. (R., 89.)

"Then follows the certificate of Ramirez, treasurer of the department, that Sandoval had rendered services and contributed money to the government. (R., 89-90.)

"Then follows the act of possession of December 15, 1845, the delivery being made to Juan Antonio Aragon, the agent of Sandoval, of a large tract of land of between 400,000 and 500,000 acres, which conflicts very materially with the claim of Baca. R., 90.)

"The title papers in these various grants are offered for the purpose of showing that from 1829 to 1845 the various officials and official bodies of New Mexico had occasion to investigate and report whether or not the land embraced in the Baca claim as made to-day was then vacant or claimed by any one, and invariably and in every instance it was reported that the land was vacant and unclaimed, and I take it that these various actions of the officials and official bodies constitute the strongest proof possible that neither Bartolomé Baca nor his heirs or any one claiming under them ever made, during all that time, a claim to this immense tract of land. Considering such testimony in connection with the irresponsible and unreliable statements of sheep herders and *peons*, leaves little doubt as to the weight of the testimony being in favor of the contentions of the government."

In the judicial investigations and discussions of grant titles, the primary and fundamental question to be solved is that of AUTHENTICITY.

Sometimes, the owner of the land holds formal letters patent, such as are issued out of our General Land Office. If such letters are in the usual form, without serious mutilation or other suspicious indicia, they are *prima facie* evidence, available as such in controversies with the government as well as in those between private parties. If, however, such letters bear on their face a suspicious appearance, their *prima facie* value as evidence is diminished, and, it may be, to such an extent as to render them unavailable to the holder, unless by further proof, positive or circumstantial, they are corroborated sufficiently to give them *prima facie* standing. The burden of proof does not shift until, from the letters themselves, in an unsuspicious case, or from the letters plus adequate corroborative proof, in a suspicious case, *prima facie* validity appears. Once admitted as full *prima facie* evidence, the letters stand for what they purport to be, until discredited by new evidence, furnished by the contending party to the controversy.

It would never be required of the holder of letters patent, having *prima facie* validity, to produce the sovereign record out of which they are born. That burden, in case of a dispute, would fall on the party controverting the integrity of the letters. The same principle which protects to this extent the holder of letters patent affecting lands, applies for the protection of holders of letters patent affecting inventions, as well as the protection of holders of government and municipal bonds, regular on their face. In all such cases, destruction of the public archives where the records, which are the foundation of the documents having *prima facie* validity, ought normally to appear does not tend to disparage the latter, but rather to

increase their evidential efficacy. Mr. Justice Harlan discusses, in *Selma Railroad, etc., vs. United States*, 139 U. S. 560, 567, the question of the burden of proof, as between a party who has, or ought to have, the custody of the best proof and a party who has not such custody.

In many of the California cases, the grants tendered from the hands of the claimants were regular on their face (assuming that the colonization law of 1824 was operative at their apparent date), but they were defeated, because there arose, from the archives themselves and from contemporaneous frauds in similar papers, the probability that the papers tendered were fabricated after the American occupation. Such papers, under the ordinary rules of evidence, and in the absence of the special circumstances attending a certain class of California cases, would have had greater evidential strength had all the archives been destroyed, just as *e converso* a clean record of a deed, under our system of registration, might operate as effective evidence, although the original deed was a forgery, and had been destroyed, and although the forgery might have been easily provable from the deed itself, had it been existent.

It was only because sufficient proof was found in several cases that some of the late officials of California were forgers and perjurers that the court, taking judicial notice of these outrageous crimes, adopted the cautious policy finally formulated as the rule announced in the Luco case (23 How. 515), under which all grants purporting to emanate from "the late government of California" were to be held as *prima facie* suspicious, until affirmatively corroborated. They smelt of crime. They were impeached by general evidence of bad character.

But the special evil sought to be avoided by the court was the imposition on our government of antedated instruments bearing *genuine* signatures, and hence inquiry was directed to the probability or non-probability *of the execution*, on or about the apparent day of its date, of a questioned instrument. Even a "trace" of the instrument in the archives derived by us from Mexico might sometimes be sufficient to overcome this presumption of fraud and forgery. Thus, in *United States vs. Sutter*, 21 U. S. 170, 175, there was "produced from the archives a draught of a grant corresponding to that produced from the county records, except in respect to the signatures," and that fact was treated as an important aid in the corroboration of the Sutter title, which the court confirmed, notwithstanding the destruction of the "original" grant issued to the donee. The court said (page 174):

> "The first inquiry in cases like this is, has the *authenticity* of the grant been established? This was not questioned in the District court, but in this court the appellants have denounced, with much force, the evidence as insufficient to support it. The *original issued to the donee* was not produced either to the board of commissioners or the District court. To account for its non-production, two witnesses were examined, who say that a paper, purporting to be an original, and which had the appearance of authenticity, was in the possession of one of them, as the agent and attorney in fact of the claimant; that this paper was destroyed by fire with the office in which both lived in the fall of 1851. An affidavit of the claimant in another case is in the record, in which he says that the original is lost. Some months

before this fire, the paper was recorded in the county registry of deeds, and the recording clerk affords some evidence to the genuineness of the paper. It is shown that it had been exhibited in controversies before the courts of justice, and had been examined by adverse claimants and their counsel, and at other times by interested and inquiring parties," etc.

Again (at page 175):

"We agree that the rule of law which requires the best evidence *within the power or control of the party* to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been willfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon *the best evidence within the power or ability of the litigant.*"

The solicitude of the court to be controlled by the good faith of the claim rather than by technical requirements in respect of record evidence, is exhibited by a contrasting of this (Sutter) case with the *Osio* case (23 How. 273), where a petition and also a duplicate (unsigned) copy of claimant's alleged grant were produced from the archives. There was no juridical possession and no satisfactory evidence of non-juridical possession, however (as there was in the Sutter case), and the circumstances of the claim, taken collectively, were so extraordinary and

suspicious as even to override the favorable presumptions which must otherwise have arisen from the archive documents; these documents themselves being evidently regarded by the court as spurious and improperly on file.

SECOND POINT.

The proviso annexed to the act of confirmation of the Nolan grant in Colorado, to the extent of eleven square leagues, must be confined in its operation to the claim which is the subject-matter of that enactment.

We have already considered this proviso, briefly, in our preliminary statement *(supra)*, and we now content ourselves with the following exposition, by Hon. Frank Springer, of the law applicable in its interpretation. This clear demonstration appears in his brief filed in the Court of Private Land Claims in the Pinkerton case, relating to the Gervacio Nolan grant, reported as No. 39:

"Upon the effect of the act of July 1, 1870, confirming Claim No. 48, in Colorado, I submit the following argument:

"There are two grants in which Gervacio Nolan and his heirs were interested, namely: Private Land Claim No. 39, in New Mexico, and No. 48, in Colorado.

"No. 39, made to three grantees, Nolan, Lucero and Aragon, was reported by the surveyor general of New Mexico, July 10, 1860, approving the grant and recommending it for confirmation by Congress. This grant was made in 1845, for land situate in the present territory of New Mexico. It appears by the surveyor general's report that Nolan held the grant partly as a grantee, and partly as a purchaser from the other grantees.

"No. 48, made to Nolan alone, in 1843, for a tract of land in the present State of Colorado, was favorably reported by a succeeding surveyor general, October 8th, 1861.

"Both were duly transmitted to Congress.

"On February 10, 1863, a number of land claims were referred by the House of Representatives to the Committee on Private Land Claims, including No. 48 and No. 9, which is said to be the same as No. 39, the serial numbers, by subsequent letter of the surveyor general having been changed.

"A report was made July 1, 1868, on some of these claims, but Nos. 39 and 48 were withheld for further investigation.

"On April 23, 1870, the House Committee on Private Land Claims reported upon No. 48, recommending its confirmation to the extent of eleven leagues, and submitting a bill to that effect, which was not then passed.

"On June 14, 1870, the Senate passed a bill, No. 843, reported by its Committee on Private Land Claims, to confirm the title to lands in Colorado to the heirs of Gervacio Nolan, which was said to be the same as that reported by the House Committee. The House passed the Senate bill on June 29, 1870. It was approved July 1, 1870, and constituted the act over which the present controversy has arisen. Long debates attended the passage of the bill both in the House and Senate. Neither in these debates, nor in the report of the House Committee of April 23, 1870, which was very voluminous, nor in the bill itself, can there be found any reference to claim No. 39, in New Mexico. It was withheld for further investigation July 1, 1868, and never thereafter reported on, or alluded to in any manner, so far as can be ascertained from the records of Congress. It slumbered, like some 60 others in like situation, to await the tardy justice of the government.

"The act of July 1, 1870, was entitled 'An act to confirm the title of the heirs of Gervacio Nolan, deceased, to *certain lands in the Territory of Colo-*

rado;' and it provides that the grant made to Gervacio Nolan, approved by the surveyor general of New Mexico, October 8, 1861, and designated as No. 48, is approved to the extent of eleven square leagues. The second and third sections provide for the survey and location of the 11 leagues, within the bounds of the original grant made by the order of Cornelio Vigil to Gervacio Nolan, and for the adjustment of the claims of actual settlers. Section 4 provides for the furnishing of approved plats of such survey to the claimants or their legal representatives, which should "be evidence of title," and concludes with the proviso:

> "'*Provided, however*, that when said lands are so confirmed, surveyed, and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.'

"This *proviso* was not peculiar to this act, but was used in the same sense by Congress in confirming other grants. Act of March 3, 1869, ch. 152.

"The contention now is, 1. That by this *proviso* the act operates as a final decision or action by Congress upon Claim No. 39 in New Mexico, so as to take it out of the jurisdiction of this court; and, 2. That the acceptance of the eleven leagues within No. 48, confirmed by the act, was a release by the heirs of Nolan of their rights under grant No. 39.

"If the first of these effects is to be given, it must be found in the act itself, without reference to anything subsequently done by the parties.

"The fifth section declares that the heirs of Nolan shall select and locate their claims according to the provisions of the act, within three months after the notice of the surveys being made; and that the party failing to make such selection and location within such time should 'be deemed and held to have abandoned their claim, and their rights and equities under this act shall cease and terminate.'

"It is not disputed that Claims Nos. 48 and 39 are wholly distinct, granted at different times; upon different considerations; for property in no wise connected, but situated about two hundred miles apart; having different parties; reported separately by the surveyor general; and in a word having no connection or relation whatever, except in the one fact that the grantee in No. 48 was one of the three grantees in No. 39. It is also undisputed that Claim No. 48, as before Congress for action, was very largely in excess of 11 leagues, and that within that claim as asserted, was a large surplus beyond the quantity confirmed.

"Now, after the passage of the act of July 1, 1870, one of two things might have happened:

"1. The heirs of Nolan might have made no selection or location within three months after being notified of the surveys being made, as required in section 5 of the act. In this event, the *proviso* would not attach, but the omission or failure of the grantees to make selection would by the terms of section 5 operate as an abandonment of their claims, and their rights and equities under this act would 'cease and terminate.' This would undoubtedly constitute final action by Congress upon claim No. 48 in Colorado, and so far as legislative action could do it, would operate as an extinguishment of all claim to that grant. Will it be contended, in such case, that the claim of the grantees in No. 39, in New Mexico, would also have been extinguished? And that by the mere failure of the grantees to select under the act of July 1, 1870, the title to all the land in both grants, part of which in one or the other was private property, guaranteed by the treaty of Guadalupe Hidalgo, would have been swept from under their feet? Such an unreasonable effect could scarcely be insisted upon, and yet it must follow the construction of the act now contended for. If the act itself operated as a disapproval of Claim No. 39, such effect was absolute, and not dependent upon any further action by the claimants. It left them only No. 48,

as to which to make their election, and if they failed in doing so, as required, that too would be gone. The mere statement of this proposition carries its own refutation. It also shows that the *proviso* could not have been a decision in itself, because in one entirely possible aspect of the case it would not have operated at all.

"If, however, the effect of the act depended upon the subsequent action of the confirmees, then the assumed extinguishment of Claim No. 39 would result from the final action, not of Congress, but of the parties; which brings up the second thing that might have happened, viz:

"2. The heirs of Nolan might have selected and located the eleven leagues as provided in the act; and in that case the *proviso* in section 4 would attach. What is the effect of such a proviso? It is well understood that a proviso in a statute relates only to the subject matter of the act, and it is never held by the courts to apply to matters extraneous, or not clearly within the subject matter dealt with. In construing a law of this kind, it must be borne in mind that the rule of construction applicable to public grants, which are ordinarily to be construed most strongly in favor of the government and against the grantees, does not apply. For this can in no sense be taken to be a grant or concession by the United States, but is simply a recognition of property rights which existed before, in private individuals, as to land which never belonged to the United States.

"The question, however, as to the effect of the *proviso*, is well settled by numerous decisions of the Supreme Court of the United States.

> "'The *proviso* is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause.'
>
> *Wayman vs. Southard et al.*, 10 Wh., 30.

"'*Proviso* in deeds and laws is a limitation or exception to a grant made, or authority conferred.'

Voorhees vs. Bank of U. S., 10 Pet., 449.

"'Where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, that *proviso* is construed strictly, and takes no case out of the enacting clause which does not fairly fall within its terms; in short, a *proviso* carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being *within the words* as well as *within the reason* thereof.'

U. S. vs. Dickson, 15 Pet., 165.

"'The office of a *proviso*, generally, is either to except something from the enacting clause, or to qualify or restrain it generally, or to exclude some possible ground of misrepresentation of it.'

Minus vs. U. S., 15 Pet. 445.

Pearce vs. Bank, 33 Ala. 702.

Sedgwick, p. 62.

Potter's Dwarris, p. 118-120.

"The subject matter of the act of July 1, 1870, was a claim by the heirs of Nolan to a grant made to him alone, for what was stated by the committee to be over one million acres of land, situate in the State of Colorado, recommended by the surveyor general *for confirmation to the full amount*. By the act, Congress allowed and confirmed a part of this claim, amounting to 48,700 acres, and prescribed the manner in which it should be selected, surveyed and

patented. Within the claim thus confirmed as the subject matter of the act, there *remained an excess* of over 950,000 acres, which Congress refused to allow; and Congress desired, while confirming the part allowed, to preclude any further claim for the excess. Here is an evident reason for the proviso, and an ample and sufficient one, without going outside the act itself. The act is a special one, confined to a single subject, as to which it was entirely appropriate and natural that such a proviso should be made. The subject naturally called for such a proviso, and all its terms can be completely satisfied without reference to another subject.

"If the act had been intended to apply to both Nos. 48 and 39, it would have provided for a selection of the 11 leagues confirmed out of *either*, and not exclusively out of No. 48.

"Let us go a step further: The question is, whether this proviso (assuming the grant to have been accepted by the heirs of Nolan under this act) would operate as a bar to another claim by or through the heirs of Nolan, against the United States, for an entirely distinct matter, not referred to or in any way connected with the act.

"Suppose, instead of inserting a proviso of this kind, the act had required the parties, upon receiving their patents, to execute a receipt to the United States for the 11 leagues, containing a release of all further claims against the United States; and that they had accordingly signed such a paper, reciting the confirmation, selecting and patenting of 11 leagues, and declaring that they received the 11 leagues 'in full satisfaction of all further claims and demands against the United States.' This would be the strongest possible position that could be taken against the claimants.

"The act of Congress itself, if acted upon by the parties, would be nothing more than a contract. In the language of Chief Justice Marshall, such an act 'is a contract, and although the state is a party

to it, ought to be construed according to those well established principles which regulate contracts generally.'

Huidekoper's Lessees vs. Douglas, 4 Dallas, 398; 3 Cranch, 1.

"I therefore suppose the act to be reduced to the form of an express contract of release, which embraces in the strongest conceivable manner everything that could be implied from the act, if acted upon to the fullest extent. Such a contract of release, executed in regard to Claim No. 48, would not operate upon Claim No. 39 in any respect whatever; and this proposition is sustained by an unbroken line of the highest authorities in England and America.

"The rule of construction of such instruments is laid down by Story in his work on Contracts (3d Ed.), Sec. 643, as follows:

> "'Where the words in a release are general, and unconnected with any recital, by which they may be limited, they must be taken most strongly against the releasor. *But if there be any recital of a particular claim, followed by general words of release*, the general words will be qualified and restrained by the particular recital.'

"He gives as an example from an old English case, that—

> "'If a man receives ten pounds and give a receipt therefor, acquitting and releasing the debtor of that debt, and of all other debts, actions, duties and demands, nothing is released but the ten pounds; because the last words must be limited by those foregoing.'

"He cites Bacon Abr., Release, F., where the rule is stated in this way:

> " ' But herein the sure rule and distinction seems to be that where there are general words all alone in a deed of release, they shall be taken more strongly against the releasor; but where there is a *particular recital* in a deed, and then general words follow, the general words shall be *qualified by the particular recital.*'

"A large number of authorities, in support of this doctrine, are referred to by Story in the notes to section 643, and he says in note 2: '*It is the settled law undoubtedly of England and of this country.*'

"Every writer on contracts before and since Story's time, has stated the same rule.

> Chitty on Contracts (10th Am. Ed.), 859.
>
> Addison on Contracts (3d Am. Ed.), Sec. 368.
>
> 2 Parsons on Contracts (5th Ed.), 501.

"In Pollock's work on Principles of Contracts (1st Am. Ed.), 442, the doctrine is stated in this way:

> " ' The principle is well established that the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.'

"The decided cases in the American courts apply the foregoing doctrine to almost every species of transaction.

"*Lyman vs. Clark*, 9 Mass. 235, was a case where the releasor had a claim against the estate of a testator for $25 as a distributive share and $50 as a legacy. On receiving $25 she signed a receipt to the executor for that amount as her proportion of the estate, and in express terms acquitted and discharged

the executor 'from all demands we have or may have on him by virtue of the said Caleb's last will.' It was held that this was not a release of the legacy, and that she could recover it, notwithstanding the receipt.

"*Rich vs. Low*, 18 Pick, 322, is still stronger. An insolvent debtor made an assignment of his property for the benefit of creditors, *pro rata*, provided they became parties to the assignment within thirty-five days. A schedule of the property and list of creditors follow, then an acceptance by the assignees, and at the end of the deed of assignment appeared the following:

> "'And the creditors of the said John Erskine, etc., in consideration of the covenants contained in the foregoing deed of assignment, do severally accept said assignment and approve of the terms and conditions thereof, and in condition thereof they do severally release and discharge the said John Erskine, etc., of and from *all and singular their several claims and demands against them, of every name and nature.*'

"This release was duly executed by the creditors, including one who held a mortgage on some of the scheduled property.

"It was claimed that by this acceptance and release the mortgage was released; and it would require but little change in the statement of this case to convert it into that of the Nolan claim.

"The court, Shaw, C. J., delivering the opinion, held that the mortgage was not released, saying:

> "'It is now a general rule in construing releases * * * that general words, *though the most broad and comprehensive*, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances

> of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties.'

"In *Averill vs. Lyman*, 18 Pick. 346, a very similar question arose under an assignment, acceptance and release, like that in the last case. The release by the creditors was of '*all sums of money due and owing or to become due* to them respectively from the said Charles Lyman; *also all their respective claims and demands whatsoever*.' It was held that this did not release a promissory note not mentioned in the schedule.

"The language above quoted from Story on Contracts was adopted by the Supreme Court of Pennsylvania in *Lawman vs. Young*, 31 Pa. St. 309, saying:

> "'This is common sense, for why particularize, if the matter is to be controlled by a general provision?"

"In *Munroe vs. Alaire*, 2 Cairns Rep. 337, Kent, C. J., delivering the opinion of the Supreme Court of New York, applied the same doctrine to the case of an award given on a matter in dispute, followed by a general release, holding that the release only affected the matter submitted.

"In *Jackson vs. Stackhouse*, 1 Cowen, 122, it was held that a release of a judgment for interest on a bond secured by mortgage, 'and also *in full of all debts, demands, judgments, executions and accounts of whatsoever nature to this date, either in law or equity*,' did not discharge the mortgage; the court citing as well settled the rule above quoted from Bacon's Abridgment, Tit. Release, K.

"In *McIntire vs. Williamson*, 1 Edwards, Ch. 34, in a very able opinion by Vice Chancellor McCoun, on the following state of facts: Where P. M. executed a release to T. B. C., by which he acknowl-

edged to have received from the said T. B. C. a conveyance of a lot of ground described as Lot No. 184, valued at $200, *in full satisfaction and discharge of all claims and demands whatsoever*, and in consideration thereof, and of one dollar, released and discharged the said T. B. C. *of and from all claims and demands whatsoever:*—It was held that such release was to be restricted to the claims and demands which P. M. had against T. B. C. for the said lot of ground, No. 184, or to some demand of $200 which the conveyance was intended to satisfy. This case is analogous in every respect to that of the Nolan grant, and we do not see how the two can be distinguished in principle. See, also, *Jackson vs. Stevens*, 16 Johns, 109.

"The same doctrine is affirmed by the Supreme Court of Missouri, in Grumley vs. Webb, 44 Mo. 443, where a receipt had been given in the following form:

> "'Received of William G. Webb, six thousand five hundred dollars, which is in full satisfaction of a judgment recovered by me against said Webb and David S. Bigham in the St. Louis Circuit Court, and the said sum is in full satisfaction of all claims and demands I have or hold against said Bigham and Webb, or either of them, up to this date.'

"It was held, upon a review of the authorities, that such a release did not, on its face, operate to discharge a claim against Webb in another suit, at the same time pending, in the same court. The court says, in a very strong opinion by Judge Wagner, that it is the—

> "'Universally recognized doctrine that language, *however general in its form*, when used in connection with a *particular subject matter*, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.'

"It was held that it was competent to go outside of the release itself, and determine from all the facts and circumstances what the real intention of the parties was.

"The same principle was adopted in *Bigbee vs. Coombs*, 64 Mo. 530. In *Hayes vs. Wetherbee*, 60 Cal. 396, it was held that the same principle governing the effect of general words in a release, extends to grants and conveyances of land, to-wit: That the general words shall be restrained to the particular occasion; and that where in a deed a particular interest or share in a certain described parcel of land was accompanied by words granting all the right, title and estate in and to the described premises, such conveyance was operative only for the particular interest first specified, and that the general words convey nothing.

"Some of the foregoing authorities hold that the release is open to explanation as to the probable intention of the parties, deduced from the surrounding and attendant circumstances, and some that the intention must be gathered solely from the recitals of the instrument itself.

"I have stated in the outset all the circumstances leading up to the passage of the act of July 1, 1870, so that the question may be considered from either point of view, I care not which.

"The title of the act is 'An Act to confirm the title of the heirs of Gervacio Nolan, deceased, to *certain land in the Territory of Colorado*.' The *particular subject matter* of the act was Claim No. 48, in Colorado. That claim was for certain land of large extent, embraced within designated boundaries. The *particular recitals* of the act related to a confirmation of a *part* of these very lands, *less than the area claimed*, upon condition of acceptance by the claimants of *such smaller portion* within a certain time, in full satisfaction of all *further* claims and demands against the United States. There *were* 'further claims' in the particular case which formed the subject of the bill, viz: The claim to the *excess of land*

above eleven square leagues. The terms of the *proviso* can therefore be fully satisfied by reference to the *subject matter* of the act, and the *particular recitals* therein, without going outside to seek for subjects that are not mentioned. If it were intended as a disapproval of Claim No. 39, how can we explain the omission of the plain, natural and easy words to say so?

"As to No. 39, no allusion can be found, either in the act or the proceedings attendant upon its passage, or anything done under the act, to that claim, save the positive statement by the committee, July 1, 1868, that it was *withheld for further investigation*. This is the last statement to be found in the record relative to Claim No. 39; and, if this is to be taken as evidence of '*the final action of Congress upon such claim*,' then appellate courts may begin to entertain appeals from interlocutory orders, continuing causes from one term to another. If this be a final decision, then must we begin to look for the judgments and decrees of courts in the blank pages of their records, and not over the signatures of the judges. If this be final action, then must we infer action from inaction, and read the acts of our lawgivers from their silence, and not from their speech."

The construction of the proviso in question by the government and its administrative officers is corroborative of the views of Mr. Springer and ourselves.

1. The surveyor general still proceeded with the Estancia case, which had been pending in his office ever since July 12, 1855, and finally made his favorable report thereon January 4, 1873 (*Transcript*, fol. 90), about two years and six months after the enactment of the proviso. (*Ib.*, fol. 162.)

2. In the private litigation concerning the possession of two springs upon the property, the said

proviso was not treated by either court or counsel as a relevant element in the controversies.

3. In not one of the four opinions rendered in our case, in the court below, was the said proviso treated as relevant, or even mentioned.

4. The tract of land involved in this case has been sacredly reserved from sale, as subject matter *sub judice*, up to the present time, and we have expended large sums in its purchase and improvement and devoted it to extensive ranch uses, without any disturbance by the government of our enclosure or possession, and with no controversies of a private nature, save with one squatter whom we defeated, and with some claimants under the Bartolomé Baca claim, which was not filed with the surveyor general until September 13, 1878, and the character of whose possessory standing is described by Mr. Justice Peckham in the Bergere case. (168 U. S., pages 76, 77.)

THIRD POINT.

The numerous decisions relating to grants in California, purporting on their face to be founded on the colonization law of 1824 and the regulations of 1828, are not pertinent to the present case, because, owing either to ignorance of the law of April 4, 1837, repealing the old colonization system (Reynolds, p. 35), or its non-promulgation in California, or the rebellious opposition of that department to the central system, or secret instructions from the Supreme Executive, the old customs and usages in the granting of lands continued in that jurisdiction.

The Constitutive Act, under which the General

Constituent Congress was elected, was passed January 31st, 1824; that Congress, on August 18th, 1824, passed the Colonization Law of 1824, and, on October 4th, 1824, adopted the Constitution, which remained in force until the new Constitution of December 29th, 1836, was adopted.

Reynolds, page 33.

Regulations to carry into effect the provisions of the Colonization Law of 1824 were certainly formulated by the Executive *(Gobierno Supremo)*, with the aid of a commission, on November 21st, 1828, but we cannot agree with Mr. Reynolds that they were "promulgated" *(Ib.*, page 34), in any general sense, on that day; for the colonization law and regulations were not promulgated in the Territory of Lower California until February 25th, 1830, and up to that time that local government, under its customs, granted lands by virtue of a special order of the Spanish visitor, Count de José de Galvez, made for that province on August 12th, 1768. *(Hall*, § 213.)

also § 234

"October 3d, 1835, the State Legislatures were abolished and Departmental Councils (Juntas) established. Nothing is provided with reference to the territories. *This marks the beginning of the first epoch of the Central System of Government.*"

Reynolds, page 34.

"October 23d, 1835, bases for a new Constitution were adopted, which declared that the national territory should be divided into Departments, the number, extent and subdivision to be determined by a future law. It provided for the government of the

Departments, appointment of Governors, election of Departmental Councils, etc.

"December 29th, 1836, the new Constitution was adopted. It provides, among other things, that the national territory shall be divided into Departments, provides for the appointment of Governors and the election of Departmental Councils, and defines their powers.

"December 30th, 1836, the country was divided into Departments, and *New Mexico and Sonora* were made *Departments*.

"March 20th, 1837, regulations were made by Congress for the government of the Departments, and the powers and duties of the Governors and Departmental Councils were defined therein.

"April 4th, 1837, the Colonization Law and all other land laws were repealed, and the general government" [*the Supreme Executive*], "in concurrence with its Council, directed to colonize the lands of the Republic by sales, leases or mortgages, and the 11th Article of the law of April 6th, 1830, was re-enacted."

Reynolds, pages 34, 35.

We refer the court to the exhaustive opinion of Mr. Justice Murray (*Transcript*, fols. 174 to 190) as showing, according to the Anglo-Saxon mode of reasoning, that, even independently of its repealing clause, the law of April 4th, 1837, necessarily repealed the colonization law of 1824 and the regulations of 1828, by the very fact that it provided for a substitutionary system of land alienations, utterly inconsistent with the system which had existed under the prior enactment and regulations. Indeed, this court, speaking by Mr. Justice McKenna, in *United*

States vs. Coe, 170 U. S. 681, at page 696, has declared that, "by a law passed April 4, 1837, all colonization laws were certainly modified, and may be repealed."

But the growth of centralism did not stop with the adoption of the so-called constitution of 1836, and the consequent destruction of all and singular the federal states and territories, their conversion into one centralized nation, absorbing all their public lands, and exercising its political powers through co-ordinate and uniform "departments," separated and divided by geographical lines, but governed in each case by a political agent of the supreme central executive, with slight assistance from a council or "junta."

On the contrary, centralism became more or less insidiously progressive, as it always does in every country whose citizens are not heroically loyal to the principles of freedom. On September 28th, 1841, military leaders, who had been successful in a revolt, formulated the "Bases of Tacubaya." "The constitution of 1836 was abrogated thereby and provision made for the election of a Congress for the sole purpose of forming a new constitution. Meanwhile, the departmental authorities then in office were to continue, the general-in-chief, Santa Anna, was to appoint a council composed of two members from each department, which was to select a provisional chief executive, and this council was to act in place of Congress until a council to be elected by the departments should convene. Congress was dissolved." (*Reynolds*, page 36.)

> "October 9th, 1841, the Provisional Council elected Santa Anna President.
>
> "December 10th, 1841, an election was

ordered for members of the Constituent Congress provided for by the Bases of Tacubaya, and on June 10th, 1842, this Congress convened."

Reynolds, page 36.

"December 19th, 1842, the acting president, Nicolas Bravo, dissolved this congress and summoned what was called a "Council of Notables," under the seventh of the Bases of Tacubaya. This action virtually made Santa Anna dictator."

Reynolds, page 36.

The seventh of the Bases of Tacubaya above referred to reads as follows:

"Seventh. The powers of the Provisional Executive are all those necessary for the organization of all the departments of public administration."

Reynolds, pages 234, 236.

Upon these autocratic Bases of Tacubaya the Executive Power made an accelerated growth.

"June 13th, 1843, Santa Anna promulgated the new constitution called the 'Bases Organicas,' adopted by the Council of Notables, and by which he was elected President.

"The powers and duties of the Governors of Departments are defined by said Constitution, as well as those of the Departmental Assemblies."

Reynolds, pages 36, 37.

New revolutionary proceedings occurred in November and December, 1844, fomented by Paredes

against Santa Anna, the President. Congress was prevented from assembling, November 29th, 1844. "December 6th, 1844, the people and garrison of Mexico" [the city] "rebelled against the government of Santa Anna and re-established the constitution" [of 1843] "and General Herrera assumed the exercise of the executive power as President of the Council, and on December 17th, 1844, Congress removed Santa Anna from the Presidency and appointed General Herera Acting President."

Reynolds, page 37.

Nor was political trouble yet over, for "December 14th, 1845, General Paredes rebelled against the government and promulgated the Plan of San Luis Potosi. This rebellion was successful, and on January 2nd, 1846, the "General Act of the Army" was adopted by the leaders. It provided for the election of a President by a Board to be appointed by Paredes and declared the Constitution" [of 1843], "in so far as it conflicted with this Plan, of no effect.

"On the next day, Paredes was elected Acting President under this Plan."

Reynolds, page 38.

"August 4th, 1846, General Mariano Salas overthrew the government of Paredes, and on August 22nd the Constitution of 1824 was re-established and a call made for a congress to be elected under its provisions, Salas acting as President.

"*This marks the end of the first epoch of the Central System of Government.*"

Reynolds, page 38.

Then followed a more or less disturbed federal era under the restored constitution of 1824, with several modifying military "plans" and "bases," until a new central system was instituted in 1853, etc., etc.

Reynolds, page 39.

In the light of these historical facts, so well summarized by Mr. Reynolds, it is bewildering to read what Mr. Justice Nelson says in *United States vs. Vallejo*, 1 Black, at page 552, in optimistic commendation of what the majority of the court, as then constituted, understood to be the settled "constitutional" Mexican system of public land administration, as contrasted with our own, then under unjust criticism in the East. Notwithstanding the powerful dissenting arguments of Justices Grier and Wayne in that case, although erroneously based on the supposed vitality of the law of the Cortes of January 4, 1813, in total ignorance of other data now familiar, the majority opinion declares (1 Black, at page 552), as to the colonization law of 1824 and the regulations of 1828:

> "Now, the above are the only laws of the Mexican Congress passed on the subject of granting the public lands, with the exception of those relating to the missions and towns, which have no bearing upon the question. No others have been *produced on the argument*, nor have *our researches* found any, nor were any others discovered by the public agents which were authorized by this Government to inquire particularly into the subject. (See Halleck's Rep., March 1, 1849, Exec. Doc., 1st Sess. 31st Cong., p. 119; Jones' Rep., April 10, 1850, Senate Doc., 2nd Sess. 31st Cong., p. 18. See

also Calif. 3 Rep., pp. 23, 24, 25; *ib.* 37, 38; 20 How., 63; 21 *ib.*, 177; 23 *ib.*, 315; 24 *ib.*, 349.)

"The ground taken to uphold this grant *concedes* that no other power has been conferred upon the Governor by any express act of the Mexican Congress; but it is insisted that the law of 1824, and regulations of 1828, did not repeal the power, if it previously existed, to make a grant of the public lands by sale for a pecuniary consideration; and the decree of the Spanish Cortes, of January, 1813, is referred to as confirming that authority.

"But any one looking at this law will see that it provides for a very different system of disposing of these lands from that found in the Mexican law of 1824 and the regulations of 1828; and, unless specifically recognized as excepted, would necessarily be repealed as repugnant and inconsistent with the system adopted."

Again, at page 554:

"Without pursuing the inquiry further, we think it quite clear that this law [January 4, 1813] could not have been in force after the *change of government*, unless expressly recognized by the *Mexican Congress*, and not then without being first *essentially modified in its policy and purposes*," etc.

The Vallejo decision was announced at the January term, 1861, but the court, as constituted today, thirty years later, having had greater opportunities for further historical research, and been especially aided by the minute investigations made in the recent Arizona cases, and, above all, by the luminous and productive labors of Mr. Reynolds, is made well

aware that, when the California cases were considered, and even when some New Mexico titles were examined (as in *United States vs. Vigil*, 13 Wall., 449), all the justices, as well as all their forensic advisers, had utterly misunderstood the historical, political and legal changes in the government of Mexico, incident to the establishment of the dictatorial central system in displacement of the federal system of 1824.

Apply the reasoning in the Vallejo case, upon political changes, to the effect, on the colonization law of 1824 and the regulations of 1828, of the subversion of federalism by centralism, under the bases of 1835, the "Constitution" of 1836, and the Bases of Tacubaya of 1841, and the result inevitably follows, according to our legal hermeneutics, that the land system of 1824 and 1828 was subverted by the change to the central system, and never restored, unless by the restoration of the constitution of 1824 in the years 1846 and 1847.

How, then, can we explain the persistent resort by the governors of California to the terms of the colonization law of 1824 and the regulations of 1828 for guidance in the making of ordinary colonization grants during the "first epoch" of the central system?

There are several explanations, viz.:

1. Ignorance of fact as to the precise course of political movements in Mexico, owing to the difficulties of communication and to the prevalent local disturbances in California.

2. Non-promulgation in California of some of

the Mexican laws and decrees, and especially non-promulgation of the law of April 4, 1837.

That law (April 4, 1837) does not appear ever to have been mentioned in any grant proceedings in California, or to have been called to the attention of the California tribunals concerned in the consideration of private land claims under American authority, or to the attention of this court in any California case considered here on appeal. On the contrary, this court and all others concerned constantly referred, for years and years, to the "colonization law of 1824 and the regulations of 1828" as the *only laws* under which grants could be made by California governors. The law of 1837 was never even mentioned in this court until it was invoked in *Interstate Land Company vs. Maxwell Land Company*, 139 U. S. 569, where Mr. Justice Lamar (page 578) alluded to the contention of counsel that the old colonization laws "had been repealed by a law of the republic passed in 1837," four years prior to the date of the Maxwell grant; but this contention was treated as irrelevant, because the Maxwell title had been confirmed by our Congress and the alleged title of the Interstate Land Company was, at most, only a political equity unavailable forensically against that confirmation.

The next mention by this court of the law of 1837 is in the case of *United States vs. Coe*, 170 U. S. 681, 691, wherein Mr. Justice McKenna elaborately discussed some of the features of the radical changes from the federal to the central system, and intimated that the system of colonization, existing under the federal constitution, had been substantially abrogated.

Under the Spanish and Mexican law, actual pro-

mulgation of a Spanish or Mexican decree or statute, in a province or governmental department, designed to be affected thereby, was essential before it could become effective there (Escriche, "*Promulgacion*," *Gonzales vs. Ross*, 120 U. S. 605, 616), and a like rule obtained in the American colonies (*Albertson vs. Robeson*, 1 Dallas, 9); and the very fact that the old law continued to be recognized in a Spanish or Mexican province, colony or department, after its repeal by the supreme government, is evidence that promulgation of the new law had not yet been made, or else that the former law, if ever repealed, had been revived.

Gonzales vs. Ross, 120 U. S. 605, 615.
Houston vs. Robertson, 2 Texas, 1, 28.

3. Rebellious opposition of the Department of California to the central system.

As early as 1834, disputes among officials arose in California as to the "constitutional powers of national and territorial authorities" (*Bancroft's History of California*, Vol. III., pages 276, 277), and plots began (*Ib.*, p. 278). An outbreak occurred in March, 1835 (*Ib.*, p. 280). Sonorans promoted disturbances at Los Angelos (*Ib.*, p. 281. See, also, pages 282 to 296, 298, 308, 355). Foreigners were endeavoring to acquire by purchase the whole bay of San Francisco. (*Ib.*, pp. 400, 401.) Discontent continued in the following years. "The people had a strong feeling against Mexican officials, as a class, and were opposed to centralism so far as they had any political opinions." (*Ib.*, p. 421. See, also, *Ib.*, pp. 422 to 425.) For twenty-five years "there had been a feeling that California was neglected and

wronged by the home government. The Mexican republic, after the success of the revolution, did nothing to remove that feeling. The people, though enthusiastic republicans in theory, waited in vain for the benefits to be gained from republicanism. The influence of the missionaries, men of education and devoted to Spain, tended strongly to foster the sentiment of aversion to all that was Mexican—an influence that increased rather than diminished as the padres lost their temporal prestige and became prone to refer bitterly, if somewhat secretly, to olden times. The sending of convicts and *cholo* soldiers from Mexico went far to intensify provincial prejudice. The Californians came to regard themselves proudly as superior in blood and morals to those *de la otra banda*. Mexicans of little experience or ability were given commissions in the presidial companies and sent to command veterans who had grown gray in the service and believed themselves entitled to promotion," etc. (*Ib.*, p. 449.) "The result was, in 1836, a strong popular feeling, amounting almost to hatred, against the Mexicans 'of the interior,' and a belief that Mexico should furnish for California something more or something less than rulers, and laws made with no reference to the country's needs. The popular feeling was not one of disloyalty to Mexico as a nation. The Californians were far from entertaining as yet so radical an idea as that of absolute independence, but they believed that territorial interest should be consulted by the nation, and that no more Mexican officers should be sent to rule California. Alvarado, Carrillo, Castro, Pico, Vallejo, and other young Californians of the same class, the men who had for the most part supplied the *diputacion* with members, the politicians of the country,

not only shared the popular sentiment, but were disposed to utilize it for their own as for their country's interests. They were willing to furnish from their own number men to rule California and handle its scanty revenues. Even they were not yet prepared to advocate entire separation from Mexico; but they were men of some education, who had come much in contact with foreigners, and had imbibed to some extent liberal views. Some of them had become more than half convinced that Mexican ways of doing most things were not the best ways. Yet they shrewdly feared foreign influence and were disposed to be cautious. * * * The rise of centralism gave to their schemes an aspect of national patriotism; while rumors that centralism was on its last legs augured comparative success." (*Ib.*, pp. 449, 450.)

The events of succeeding years show, with their repeated political disturbances, attempts to promote local "plans" and "bases" of federal government, inconsistent with the central syetem, and resistance to the weak authority of Mexican rulers, that California, all through the "first epoch of the central system," was, in language quoted in *United States vs. Coe*, 174 U. S. 578, at page 579, "a conservative protestant against the dictatorial proceedings which gave rise to the central system," holding towards the national government an attitude of hostility similar to that of Sonora, although less pronounced and less effective.

In these circumstances, it is more than probable that the Supreme Executive of Mexico was indisposed to irritate the federal feeling of the people of California by depriving them of the local benefits of the old law of colonization, or of the old participa-

tion of the voters, through their representatives, in the administration of the public domain, and, therefore, by silence, or by secret instructions to such of the governors as were deemed loyal to centralism, permitted the terms of the old law to remain operative, with at least the force of a custom.

References to the perturbed state of California in the latter part of the first epoch of the central system are made by the court in the cases of *Fremont*, 17 How. p. 562; *Bassett*, 21 How. p. 413; *Rose*, 23 How. p. 266, and several others.

The California cases were almost all cases of grants purporting to have been made under the colonization law of 1824 and the regulations of 1828, which the officials assumed to be in force; being apparently wholly ignorant of their repeal by the law of April 4th, 1837; but, under that law and those regulations, the officials exercised only limited and specially prescribed local functions, subject to a code of procedure in part mandatory and in part directory. Hence, the non-observance of certain specified formalities in the making of such grants was from time to time commented on by our courts. Nevertheless, it was held, even as to such grants, that the mere form was not essential (*United States vs. Larkin*, 18 How. 563), that the want of a map or preliminary report did not affect their validity (*United States vs. Hornsby*, 10 Wall. 237), and that it was not necessary that the conditions of cultivation or occupation should be inserted in them (*United States vs. Yorba*, 1 Wall. 423).

But no form, or other conditions whatever, were required in grants made by the supreme executive, through his appropriate agents, under the central system. Even in our own country, many executive acts

of the last importance are evidenced only by a letter, or telegram, or even spoken word, of the competent executive authority. The president of the United States may speak as president in any part of the national jurisdiction, without regard to perfunctory form. If present in the remotest wilds of the United States, or its territorial possessions, he may stay an execution or condone a crime by his mere word of mouth, spoken at the foot of the gallows tree. One of the subscribers once saved a human life by the telegraphic order of the president, through the attorney general, transmitted from Washington to Santa Fé. In two instances, chief justices of the Supreme Court of New Mexico have been suspended from the exercise of their judicial functions by a mere telegram from Washington.

The meaning and exercise of a sovereign executive act are found in the act itself, irrespective of mere form, even in our own settled constitutional system, and such an act is all the more potent and emphatic when it emanates from a tyrant or a dictator, or his appropriate agent, whether pro-consul, minister, governor or commandant general. Executive action, when an exercise of general discretionary power, in person or through appropriate agents, is only politically examinable, while executive action, authorized only by a prescribed, limited, restrictive statute, may be judicially reviewed.

Marbury vs. Madison, 1 Cranch, 137.

FOURTH POINT.

The Estancia grant was made at a time when New Mexico was living in subjection to the central system of government; and Manuel Armijo, as Governor and Commandant General of that department, was the trusted minister and agent of the quasi dictatorial Supreme Executive of Mexico, and duly acted as such in making the grant in the name of the Supreme Government, and was not restricted by any prescribed rules or limitations.

While California, bordering on the open sea, and having good harbors, was engaged in maritime commerce, and was otherwise so attractive in her natural resources as to have drawn into her population numerous foreigners, Americans, English, French and Russians, imbued with free and adventurous notions, and, with the large and influential body of Spanish priests and missionaries already there, not in sympathy with the dictatorial proceedings in Mexico, and was, at the same time, immune from border or foreign warfare, except to a very limited extent with savages, New Mexico, on the contrary, was simply a pastoral country, with only such commerce as was transacted over the "Santa Fé trail," and her poor and humble peasants were exceedingly devoted to their rulers, no matter what the form of government. At the same time, they were enured to danger, for their homes were often invaded by the most truculent savages.

The military spirit was always stimulated by this constant danger, and it was greatly increased during their experience in border warfare with the Texans. The Supreme Executive, owing to the belligerent attitude of American colonists who had settled in

Texas, became exceedingly jealous of the United States, and apprehensive of new aggressions. New Mexico, with her lowly, but brave and patriotic, peasants, was the bulwark on which Mexico relied to withstand invasion from the north and east. New Mexico felt the first blows, dealt by Texas, and then by the United States. Foreseeing the inevitable contest with us, it was the military policy of the Supreme Executive, while keeping the frontier free from settlement by foreign colonists, to distribute lands there with a liberal hand to Mexican citizens who were conspicuous for military ability, social influence and staunch devotion to the central government. From any point of the Mexican view, it was deemed best to convert the most available public lands on, or near, the northerly and easterly frontiers into large holdings, in the private ownership of trusted Mexican favorites; for, whatever the tide of fortune, the rules of international law would protect private property, even in case of conquest. The result was the establishment of "a cordon of land grants," each of great extent, such as the Sangre de Cristo, about 1,000,000 acres; the Beaubien and Miranda (or Maxwell), nearly 2,000,000 acres; the Vigil and St. Vrain, intended to be about 4,000,000 acres, and several others, all intended to be of great extent. In such esteem was New Mexico held for her extraordinary patriotism that it was with great and eloquently expressed reluctance that Mexico consented to her inclusion in the cession made by the treaty of Guadalupe Hidalgo.

Even after the overthrow of the central system, and the restoration of the federal system of 1824, by General Salas, he issued a decree of colonization, dated December 4, 1846 (*Orozco*, p. 219), by the

45th article of which provision was made for the founding of military colonies on the *coasts* and *frontiers*, especially for impeding the irruptions of the savages.

General Armijo soon became a favorite and confidential agent of the Supreme Executive under the central system. It is said that he at first vacillated between federalism and centralism, but he decided in favor of the latter. He was made *Commandant General*, as well as Governor, of the Department of New Mexico. In the spring of 1841 a Texan invading force was fitted out under the command of General Hugh McLeod (*Bancroft's Arizona and New Mexico*, p. 320), and it reached New Mexico in September of that year. Specially warned from Mexico, General Armijo called Prefect Antonio Sandoval to the capital to act as governor, while Armijo himself set out with the presidial troops. (*Ib.*, p. 322.) He succeeded in defeating and capturing the invaders, and most of them were sent to the national capital. (*Ib.*) The news of Armijo's successes was received in Mexico with enthusiasm ("*la fausta nueva se celebró en México con salvas y repiques*"), and the *Diario*, the government journal at the capital, contained an article laudatory of these achievements of Armijo and complimentary of Santa Anna, "whose administration," it declared, "seems destined by Providence always to achieve for the country the most complete glory and the most important triumphs for assuring its nationality and independence"! (*4 México á Través de los Siglos*, p. 476.)

Armijo had been political chief of New Mexico in 1828 (*Bancroft*, *Ib.*, p. 314). During the "revolution" of 1837-8, when Governor Perez was killed and some archives lost, Armijo acted as Governor and

Commandant General and put down that petty rebellion. "In recognition of his services," he "was given the rank of colonel, and confirmed for eight years in his assumed positions of governor and commandant general." *(Ib.*, p. 319.) "In 1839, New Mexico was separated from Chihuahua and made a commandancia" *(Ib.*, p. 313), which, we understand, was a military jurisdiction.

On October 18th, 1841, Santa Anna decreed that the division and distribution of property or funds *(caudales)* of the Departmental Treasuries should be made by the intervention of the commandants general for the preferential payment of the troops, and treasuries *(oficinas de Hacienda)* were required to account to those military officials whenever required. *(4 México*, p. 476.)

By a decree of December 16th, 1841, the office of Superior Chief of the Treasury was abolished and the Commandants General were given visitatorial and superintending authority and required to "make timely reports to the *Supreme Government*," etc.

Reynolds, p. 238.

The correspondence between Armijo and the Supreme Executive must have been very extensive and important, but owing to the spoliation of the archives it is unavailable to us. Bancroft says *(Ib.*, p. 20): "M. Alphonse Pinart has a *Coleccion de Documentos sobre Nuevo Mexico*, composed of a large number of unbound original MSS., collected by himself from various sources and kindly furnished for my use. It is particularly rich in official communications between the rulers of New Mexico and the supreme authorities in Chihuahua and Mexico; and it has enabled me to fill many a gap in the country's annals."

The lamentable waste of public archives—a waste for which the sovereign custodian is responsible to such a degree as to work an equitable estoppel against self serving use of the fact of the absence of those not appearing—is the more significant when we consider that the early surveyors general spoke with confidence in their reports of the existence of communications from the Supreme Executive of Mexico to Governor Armijo, clothing the latter with extraordinary faculties in the granting of lands. For instance, Surveyor General Pelham, who was in office soon after the passage of the act of 1854, and upon whom was cast the responsibility of investigating as a federal officer many of the titles afterwards confirmed on his recommendation by the act of June 21, 1860 (including the Sangre de Cristo, the Maxwell and others of the most important, embracing millions of acres), and whose integrity, competency and judgment are not to be disparaged, stated unequivocally, in his report of the Las Animas grant (then supposed to involve 4,000,000 acres), which report bears date September 17, 1857: "At the period [1843-1844] when this grant was made the province [department] of New Mexico had just emerged from a series of revolutions and civil commotions, which had caused the general government of the republic to confer upon the governor of the province [department] extraordinary and almost absolute power in all things relating to the domestic affairs and internal government of the province [department]. Under this authority and the extraordinary powers vested in him, this grant is purported to have been made, and it is to be presumed that he acted within the scope of his authority, as it has never been contested or contradicted."

The Las Animas grant was reported as No. 17 and so recited in the said act. 12 st., p. 71.

In an opinion furnished by Hon. J. P. Benjamin *in re* The Beaubien and Miranda land grant, and dated at the Temple, January 18th, 1871, he said, as to the Senate Committee which considered the bill for the Act of June 21, 1860, and of which he was a member: "The committee had for decision a list of eighteen claims designated by numbers shown in the first section. It came to a decision upon *each claim separately*, as shown on the face of the first section. It declined to act on Nos. 2, 5, 7, 11 and 13, and they are neither rejected nor confirmed, conditionally or unconditionally. It did act on Nos. 1, 3, 4, 6, 8, 9, 10, 12, 14, 15, 16, 17 and 18, and confirmed them all. * * * It recommended that the grant 17 should be confirmed as to eleven leagues only for each claimant for the reason that the grant was on its face for *a* tract of land *in a certain locality*, and the Surveyor General had recommended the confirmation of the claim '*to the whole locality*.' The committee thought this wrong and said that in the *absence of any other guide* it would be a fair and liberal construction of the grant to allow the largest grant permitted by law to *a single colonist*."

For lack of the historical and legal information which has since been acquired on the subject of the Mexican theory and practice of government, under the central system, and, "in the absence of any other guide" than the old colonization law, which, in so many judicial decisions, had been recognized as still operative during that period in California, it was quite natural for the committee, in its effort to do justice, to resort to the provisions of that law in resolving the doubt as to the quantity of land intended

to be granted. The probability is that all the land described by the petitioners was intended to be granted, but that the petitioners blundered in the phraseology of their petition, or the translator erred.

Judge Brewer, in his opinion in the Cleaveland and Colorado Cattle Co. case, 33 Fed. 323, *supra*, said, at page 328:

> "The general rule and the ordinary limitation was understood to be eleven square leagues to each individual; and, unless there be something in the proceedings which clearly indicates the intent to grant more, that ought to be understood the limit intended."

Yet the Sangre de Cristo title, which was confirmed on the same committee's report (*Tameling case*, 93 U. S. 644), was granted on a like petition, presented to the governor, containing the very same ambiguity, but the papers before the committee contained also the grantees' petition to the magistrate for juridical possession, and, in that petition, they referred to the land "contained" in their original application as having been "granted" to them (*Ib.*, page 648); and possibly this paper (the equivalent being absent from the Las Animas case) may have induced the favorable action of the committee.

1. The "laws" (*leyes*) embraced not only the old, applicable federal, or constitutional, statutes and executive decrees, together with old applicable Spanish decrees, cedulas and royal orders, but they embraced, also, "decrees" and special orders and secret instructions of the later dictatorial Supreme Executive, which imported in their terms much of a legislative and judicial, as well as executive, charac-

ter. These were intended to declare and enforce a military as well as a civil policy. Something faintly analogous is seen in the orders of our provisional military governments of ceded districts of country. Our courts frequently refer to Mexican "decrees," indiscriminately, whether they proceeded from a so-called "Congress," or other legislative assembly, or from the Supreme Executive.

In the Arredondo case (6 Pet. pages 714, 715), the court defines "laws and ordinances," and declares that usages and customs come within the definition, saying (*Ib.*, page 715):

> "We cannot impute to congress the intention to not only authorize this court, but require it, to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a mockery of it as would be evinced by excluding from our consideration usages and customs which are the law of every government, for no other reason than that, in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a *royal order* because it was not called a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule establisned in *Henderson vs. Poindexter*. See 12 Wheat. 530, 540."

2. Attention to the history of Mexico, so far as its incoherent chronicles can be called history, will convince any candid mind that political changes originated, as a rule, in military centers, and nearly al-

ways in the capital; that each involved the ambitions of soldiers and the dreams of theorists; that each began with a local energy which, when not spent in a political spasm, of short duration, extended only by slow undulations to the remote parts of the country; and that, meanwhile, as is well proved by the experience of California, the old laws, ordinances, usages and customs prevailed in such far-away places, until the effectual promulgation and operation there of the newly generated political power.

So, we find in New Mexico, the genius of Santa Anna, the rhesian Napoleon of Mexico, at last pervading every nook and cranny of that department, and growing almost constantly in vigor during the centralist movements, involving the Bases of 1835 and the so-called constitution of 1836, the enactment of the colonization law of April 4, 1837, which confided the entire public domain to the discretionary disposition of the Supreme Executive, the formulation of the Bases of Tacubaya, which made Santa Anna "virtually a dictator" (*Reynolds*, p. 36), the insincere Bases of 1843, which operated always under the shadow of the more dictatorial ones of Tacubaya, the ambitious centralism of Paredes, effectual in November, 1844, but resisted to some extent by the merely local re-establishment of the centralist Bases of 1843, and again made effectual in December, 1845, by the "Plan of San Luis Potosi," even more dictatorial in terms than that of Tacubaya, and the continuance of this aggravated centralism, until its nominal overthrow by General Salas, in the midst of our war with Mexico, when "federalism" became again the shibboleth of the noble "patriots," who, in 1846, recalled their Napoleon from his voluntary exile, by the "Plan of the Citadel," formulated in a

fortress, August 4, 1846, by the "Generals, Chiefs and Officers" there assembled (*Reynolds*, p. 253), which declared (*Ib.*, p. 254):

> "All Mexicans loyal to their country, including those who are out of it, are called upon to give their services in the present national movement, to which is *very especially invited* his excellency, *the well deserving of his country*, General Antonio Lopez de Santa Anna, who is at once recognized as the General-in-Chief of all the forces that are enlisted and resolved to fight, that the Nation may recover its rights, secure its liberty and be governed by itself."

This plan, in its fourth recital, declares the Herrera congress and government and all its laws "void" and illegitimate, and denounces the administration as "composed of men, some of them addicted to the monarchy and others to the ... *'able centralism'*"! And yet, by its third article, it confers for the time being absolute power on Santa Anna, and, by its fifth article, flatters the army as "the worthy military class of a free people" and assures it attention and protection as its due. (*Ib.*, p. 255.)

From such a source, tainted with hypocrisy, came the temporary restoration of the constitution of 1824.

3. We assume that, in the light shed on the subject by Mr. Reynolds' historical researches, it will be conceded that, under the central system, all grants of public lands in New Mexico made in the name of the Supreme Government by its authorized agents were valid, without any subjection whatever to former federal restrictions.

(*Reynolds*, p. 41; *Orozco*, pp. 291, 293;

Eduardo Ruiz, Procurador General de la Nacion, in his letter appended to this brief.)

4. Even in the obscurity which dimmed the judicial vision in earlier days (admitted with dignified humility by Mr. Justice Grier, in *United States vs. Peralta*, 19 How. 343, as it had been by the great chief justice in *Soulard vs. United States*, 4 Pet. 511, 513, cited, on the same subject, by Mr. Justice Brown, in *Crespin vs. United States*, 168 U. S. 208, 212), the court was impressed with what it was able to notice of the autocratic authority of the Mexican Supreme Executive.

Take two illustrative cases:

First.—United States vs. Osio, 23 How. 273. While it is manifest from the opinion (pages 281, 282) that the court was deeply influenced by the suggestion of the government that the alleged grant considered was an antedated fabrication; nevertheless, it chose to put its decision on the ground of want of power in the governor to make it, since it appeared that it was claimed to have been issued pursuant to an *express dispatch* of the president, produced in evidence, dated at Mexico, July 20, 1838 (*Ib.*, page 277), which, however, was construed as importing in terms the necessity of *concurrent* action by both the governor and the departmental assembly. (*Ib.*, page 284.)

The court said, as to the power of the president (*Ib.*, page 283):

> "Neither side, in this controversy, disputes the authority of the Mexican President to issue the order contained in the dispatch. From its date, it appears to have been issued during the administration of

> General Anastasio Bustamente. He succeeded to the presidency, for the second time, on the nineteenth day of April, 1837, after the capture of Santa Anna in Texas, and remained in office until the sixth day of October, 1841, when he was driven from the capital by the partisans of his predecessor. * * * It cannot be doubted but that, at the date of this dispatch, the President had assumed extraordinary powers, and was, in point of fact, to a considerable extent, in the exercise of the legislative as well as the executive powers of the Government. Assuming that the dispatch was issued in pursuance of competent authority, it must be considered as conferring a *special power*, to be exercised only in the manner therein prescribed."

Second.—United States vs. Castillero, 23 How. 464.

In this case, the court believed the title papers to be free from suspicion of fraud, and confirmed the grant. Mr. Justice Clifford wrote both the opinion in this case and that in the other.

It appears that, on the same day that the dispatch mentioned in the Osio case was forwarded, "another special dispatch was sent, reserving out of the general grant [intended by the first dispatch] such island as Castillero might select."

The court said (*Ib.*, page 468) that—

> "It is obvious, from the language of the special dispatch, that it was issued subsequently to the other communication, and must be regarded as qualifying the latter, so far as their terms are repugnant."

Again (*Ib.*, page 469):

> "Emanating, as the dispatch did, from the supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the Department. Neither the Governor, the Assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the supreme Government. Nothing therefore remained to be done, after the selection by the claimant, but to issue the title papers, and *that was the proper duty of the Governor, as executive organ of the Department.*"

The court was still ignorant of the colonization law of April 4, 1837; but it said "that dispatch bears date at a period when the President was in the exercise of extraordinary powers." (*Ib.*, page 466.)

5. The political situation of the departments under the central system bore much analogy to that of the provinces under the antecedent Spanish monarchy; but it is noticeable that the departments were higher in standing than mere colonies; for they were integral parts, each and all equal in dignity, of one consolidated empire, called at first a "Republic" and afterwards a "Nation." The central political intelligence of this nation was the Supreme Executive, and that intelligence radiated throughout the whole national jurisdiction and appeared in national deeds performed by appropriate instrumentalities. As the Supreme Executive was the head of all administration, so the departmental ministers were the hands. He was a Briareus. Under our own constitutional government, the departments to which the

secretaries are assigned respectively are departments of intellectual administration, not involving the actual corporeal political possession by them of any geographical subdivisions of our country. They are, primarily, confidential ministers of the President, but, secondarily, they may also exercise specific duties imposed upon them directly by statute. In the former capacity, they represent the President, being, in the language of Chief Justice Marshall, "political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion;" and their acts in the exercise and within the limits of these primary functions are "only politically examinable." (*Marbury vs. Madison*, 1 Cranch 137, at page 166.) But, in the other capacity, their acts not being manifestations of the constitutional discretion of the President, are, like the acts of subordinate officers in general, fully subject to judicial criticism. (*Ib.*, 171.)

See, also—

U. S. vs. Black, 128 U. S. 40.
Id. vs. Schurz, *ib.* 378.

Under the Mexican central system of government, the Governor and Commandant General of a Department was as closely representative of the Supreme Executive as one of our cabinet secretaries is of the President, but the "department" of such a Governor and Commandant General involved, besides intellectual administration as the confidential minister and agent of the Supreme Executive, the actual physical political possession and civil and military

government of a prescribed area of territory. At the same time, such an office might also involve many secondary prescribed and limited functions each of the nature of "a specific duty" imposed by law.

6. Aside from what is to be necessarily implied from the very fact that such a Governor and Commandant General was naturally the appropriate departmental representative, in peace and war, of the central dictator or Supreme Executive, we find in the Bases of 1835, the "constitution" of 1836, and the Bases of 1843, not to speak of the Plan of Tacubaya and the attending "laws" or "decrees," specific provisions plainly expressive of the intimate representative and ministerial relations which the Governor and Commandant General bore to the Supreme Executive.

(1.) By the Bases of 1835 (*Reynolds*, p. 201), it was provided that "The Executive Power of the Department shall *reside in the Governors in subordination to the Supreme Executive of the Nation.*"

(2.) By the "constitution" of 1836, it was provided that "The interior government of the Departments shall be *entrusted to the Governors in subordination to the General Government*" (*Reynolds*, p. 204); that among the duties of the Governors are "*To comply with and cause to be complied with the decrees and orders of the General Government,*" and to report to the General Government (*Ib.*, p. 206); also "to watch over the officers of the Exchequer of the Department in the manner the law shall provide." (*Ib.*, p. 206.)

(3.) By the law of March 20, 1837 (*Ib.*, p. 211), it was among other things provided that the *governors* "shall be the *usual channels of communica-*

tion between the Supreme Powers of the nation and the Departmental Councils (Juntas) and between the latter and the officials of the Department." (*Ib.*, p. 215.)

(4.) By Executive Decree of April 17, 1837 (*Ib.*, p. 224), a Superior Chief of the Treasury was established in each Department, and he was to be a member of the Board of Sales, and a copy of the minutes of such Board was to be transmitted to him "for such purposes as may be necessary and to enable him to make a *report to the Supreme Government.*" He was to call or "hold" the meetings of the Board. The Departmental Treasury was to "depend immediately" on the Superior Chief. "The net proceeds of the revenues, taxes and *property*" in the Department were to go into the treasury. Apparently, public sales of departmental property might be made by the Board under the prescribed terms of this executive decree. This decree also devolved on the Superior Chief the powers formerly exercised by the Commissaries. Later the functions of this Superior Chief were devolved on the Governor, *infra.*

(5.) But by the law, or decree, of December 7, 1837 (*Ib.*, p. 230), the governor was given supervisional power over the treasury, and enjoined to "report without delay to the Supreme Government the omissions and abuses" he might observe, and was required to *preside* over the Board of Sales.

(6.) By decree of December 16, 1841 (*Reynolds*, p. 238), the office of Superior Chief of the Treasury was abolished, and the *Commandant General* made *Inspector* and *Visitor* of the Treasury in his Department, to "see that the public revenues are well and faithfully collected, ad-

ministered and disbursed, under existing laws, regulations and *other provisions*," making "timely reports" to the Supreme Government.

The purpose of this decree, which was to go into effect from the beginning of 1842 (*Ib.*, p. 238), was evidently to facilitate the preferential appropriation of departmental property and funds for military uses, according to the policy of the order of October 18, 1841, referred to in 4 *México*, *supra*, p. 476, where it is said:

> "Para que en ningún caso se careciese de lo necesario para mantener en buen pie á las tropas, el 18 de octubre dispuso Santa Anna, y así lo ordenó el ministerio de Guerra, que los *repartos* y *distribucion* de *caudales* de las *tesorerías departamentales* se hiciesen con intervención de los *comandantes generales* 'para no dar lugar á reclamos en la satisfacción de los haberes de las tropas, mediante á que éstas deben ser pagadas *con preferencia á todo empleado*.' Los comandantes generales quedaron también autorizados para *fiscalizer* la recaudación é inversión de caudales en las oficinas de Hacienda, que rendirían cuentas á dichos funcionarios militares siempre que se las pidiesen."

(7.) By the decree of February 10, 1842 (*Reynolds*, p. 239), the Boards of Sales in the several Departments were commanded to sell "temporal properties" for cash; the same being the confiscated ecclesiastical estates.

We have no evidence that any Board of Sales was ever organized in New Mexico. The land there was too poverty-stricken to command a cash market.

(8.) By the Bases of 1843 (*Reynolds*, pp. 244, 247), it was provided: "The Governors are the

only and *necessary conduct of communication with the Supreme Authorities of the Republic;*" also *(Ib.)*: "To exercise with respect to the employés of the Department the *same powers*, which power VIII of Article 87 gives to the *President of the Republic;*" also *(Ib.)*: "To see that *justice* is *promptly* administered in the Department, in the *same manner that the President of the Republic* should do so;" also *(Ib.*, p. 248): "To be the *Chief of the Public Treasury* of the Department, and to have in general the supervision which the law gives him."

7. The "extraordinary powers" attributed by the court to the Supreme Executive in the Osio and Castillero cases *(supra)*, although researches had not yet brought to the court's attention the law of April 4, 1837, with its significant recognition of the Executive power over the public domain, steadily increased in the subsequent progress toward an autocratic form of government.

(1.) The law of April 4, 1837, declared, in its first clause:

> "El gobierno, de acuerdo con el consejo, procederá á hacer efectiva la colonizacion de los terrenos que sean y deban ser de propiedad de la república por medio de ventas, infiteusis ó hipotecas, aplicando el importe (que en las primeras *no deberá bajar* de diez reales por acre) á la amortizacion de la deuda nacional contraida ó que se **contrajere, reservando siempre lo bastante para cumplimiento de lo prometido á los militares que cooperaron á la independencia,** y para los premios y concesiones que decrete el congreso á favor de las tribus ó naciones indígenas, y *de los cooperadores al restablecimiento de Tejas*," *etc.*
>
> (Galvan's *Ordenanzas* (6th Ed.), page 136).

We quote the orignal, so that the court may make a comparison between it and the translation as given in *Reynolds*, at page 224, and then determine whether or not it is correct to render the parenthetic words ("que en las primeras *no deberá bajar* de diez reales por acre"), as is there done, into the English words: "Which in the first case *shall not be less* than $1.25 per acre," instead of rendering them "which in the first case [or "first instance," or "in the most important," or whatever "*en las primeras*" actually means in English] *ought not to be* ["*deberá*" being used in an auxiliary sense to suggest the precatory, or advisory, as "should" often does in English, and not to suggest a mandate] less than ten reales per acre." Rockwell renders "en las primeras" into "in the first instance," and "no deberá bajar" into "should not be less."

His translation is adopted by the chief justice of the Court of Private Land Claims.

(See his opinion, filed December 10, 1900, and a printed copy appended to this brief.)

The learned chief justice says in his opinion:

> "Just what was the effect of the words '*in the first instance*' in the law is difficult for us to determine. The duty of construing the act, as a whole, and in its parts, devolved upon those officers whose duty it was to administer it, and their interpretation was final and conclusive, for, in Mexico, the laws which relate to the executive department *are not the subject of judicial construction*, but the executive and legislative departments are the sole judges, both of the constitutionality and effect of such laws. We know, as matter of fact, that in all the territory acquired by the United States from

> Mexico there never was a sale of land by Mexico at $1.25 per acre, or for any amount anywhere near that. Yet public lands were continually disposed of in that territory, after 1837. This circumstance affords ample evidence, to my mind, that a construction was placed upon the words of the law favorable to the disposition of lands in the remote regions of the country at a less price, and even permitting them to be granted without consideration other than that of settlement, when the real interest of the country and people would thereby be conserved."

The court will notice that the verb "*procederá*" in the first line of the original is in the indicative future, adapted to a command, and that, if a command had been meant by the parenthetic clause, the verb "*bajar*," instead of being used in the infinitive, would have been put in the future—"*bajará*"—without use of the *quasi* auxiliary "*deber.*"

Mr. Hall, in his *Mexican Law*, page 115, § 327, translates the parenthetic clause thus: "(which for the *best lands should not be less* than ten reales per acre)."

Difficulties of translation may work much mischief in legal and judicial opinions. Thus, in *Foster vs. Neilson*, 2 Pet. 253, only the English counterpart of the Treaty of Florida of 1819 was resorted to by the court, and, construing the verbs "*shall be ratified and confirmed*" in the eighth article as importing an executory political duty on our government, the court held that the grants referred to in that part of the treaty required our political confirmation before they could become complete titles. But, discovering afterwards, in the *Arredondo* case, 6 Pet. 691, 710, 734,

741, and the *Percheman* case, 7 Pet. 51, 88, 89, that the verbs in the Spanish counterpart were "*quedarán ratificadas y reconocidas*" properly translated "*shall remain ratified and confirmed*," the court overruled the former construction, on the ground that, in the interpretation of a treaty of cession, the intent of the sovereign grantor should control. (See also argument of Mr. White, 7 Pet., pages 68, 69, 70.) So, in *Ainsa vs. United States*, 161 U. S. 208, great significance was attached to the word "located" in the English counterpart of the Treaty of Mesilla; but, in the Spanish counterpart, the word appears as "*inscrita*," as to which, in a letter of Prof. Lang, of Yale University, to whom we referred the question in 1896, he confirmed our opinion that "*inscrita*" means a literary act of filing, entering or recording, and not a survey or other act of boundary marking, or boundary description.

(2.) Again, the Bases of Tacubaya entered into the body of law and the executive practice, and they were essentially dictatorial.

In the decree of March 11th, 1842 (*Reynolds*, p. 240), the 12th article declares:

> "12. Foreigners cannot acquire national or public lands in any of the Departments of the Republic, without contracting for them with the *Government*, which possesses this right *in representation of the dominion of the Mexican Nation*."

Having, by decree of December 9, 1843 (*Reynolds*, p. 250), declared that "The value of the public lands not on the frontier and not affected by any other obligation is applied to the payment of the credits caused by the redemption of copper coin,"

the Supreme Executive, by decree of December 29, 1843 (*Ib.*, p. 251), construed the former as meaning that it *mortgaged* "only a portion of the public lands equivalent in value to said debt," but reserved to the government to *indicate what lands* are to be mortgaged and to fix their value, declaring, finally, that "consequently the *government is free to dispose of the public lands for the public benefit.*"

NOTE.—This decree was issued nearly six months after the promulgation of the Bases of 1843.

(3.) The "consejo," or council, mentioned in the Act of April 4, 1837, was, of course, abolished by the new Bases of 1843, but the councillors attending the Supreme Executive were never more than mere advisers, and, so far as their advice was important, it must be presumed to have been given.

People vs. Livingston, 8 Barb. (N. Y.) 253, 279, 280.

Vanderslice vs. Hanks, 3 California, 28, at page 39.

This is one of the cases cited by the court in the *Vallejo* case, 1 Black, 541, at page 552.

8. Reconciliation of apparently conflicting theories of the powers of our departmental Secretaries, as well as Spanish and Mexican governors and commandants general, in the doing of official acts, whether civil or military, results from a due consideration of the essential differences, pointed out by this court in several cases, between acts of "political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion," and acts of the same

officials purporting to be within the scope and limitations of "a specific duty" directly imposed upon *them* by law; acts of the first class being "only politically examinable," while acts of the other class fall into the category of subordinate official acts, independent of the supreme executive discretion, and are therefore subject to judicial examination in order to test their validity by their conformity or non-conformity with the prescribed law.

Marbury vs. Madison, 1 Cr. 137, 166, 170, 171.

Gaines vs. Thompson, 7 Wall. 349.

And, while political questions may be converted into judicial questions by direct legislation (*Arredondo* case, 6 Pet., pp. 711, 729), the courts, in administering such a jurisdiction, have always indulged more liberal presumptions in favor of the authority of high ministers and agents of the supreme executive than in favor of that of inferior officers, having only defined and specific non-representative functions.

When the secretaries of our governmental departments are required by acts of Congress to discharge certain specific duties expressly devolved on them by such statutes, outside of their primary functions as advisers and confidential agents of the president, they may be compelled by mandamus to discharge such duties, and their acts, within the scope of such legislation, may in other ways be condemned or approved judicially, in the light of the enactments which are their only authority to act at all in the prescribed cases.

But, when one of our secretaries exercises a dis-

cretionary function *of the president* appropriate to be transacted through such secretary's office, the very act of the secretary, although it can have no legality except what flows from the order or direction of the president, is assumed *prima facie* to have been sanctioned by executive order or consent, and it is not necessary, in any litigation involving the effect of such an act, to show in its support an actual order or ratification thereof by the president. The law of presumption controls just as much in such a case as it does in a case involving an act done, in the name of the King, by a Spanish or other colonial governor. See the *Arredondo* case, 6 Pet. 691; *People vs. Livingston*, 8 Barb. 253, 279, 280, both relating to the presumed powers of colonial governors. And, as to the presumed powers of our departmental secretaries, see—

Wilcox vs. Jackson, 13 Pet. 498.
United States vs. Eliason, 16 Pet. 291.
United States vs. Jones, 18 How. 92.
Wolsey vs. Chapman, 101 U. S. 755.
Jones vs. United States, 137 U. S. 202, 217.
Jones vs. United States, 141 U. S. 369.
Hamblin vs. West L. Co., 147 U. S. 536.
Wood vs. Beach, 156 U. S. 548, 549.
Ex parte Van Hoven, 4 Dill. 411.

In the *Wilcox case*, 13 Pet. 491, the court considered the prohibition, by the act of May 29, 1830, of pre-emption entries on land reserved from sale "by order of the president;" saying, page 513, as to the failure to prove such an order:

> "Now, although the immediate agent, in requiring this reservation, was the secretary of war, yet we feel justified in *presuming* that it was done by the approbation and direction of the president. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In the *Eliason* case, 16 Pet. 291, 302, the court said:

> "The secretary of war is the regular *constitutional organ* of the president for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as *the acts of the executive.*"

In *Wolsey vs. Chapman*, 101 U. S. 755, the court reaffirmed the *Wilcox* case, *supra*, and said:

> "That case is conclusive of this, unless the word 'proclamation,' as used in the present statute, has a signification so different from 'order' in the other as to raise a material distinction between the two cases. We see no such intention on the part of Congress."

Then the court proceeded in the following language, which Mr. Justice Brewer incorporates in his opinion in *Wood vs. Beach*, 156 U. S. 548, at page 550:

> "A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be

attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sale of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily, from the decision in *Wilcox vs. Jackson*, that such an order, sent out from the appropriate executive department in the regular course of business, is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

9. Just as the court in the *Eliason* case, 16 Pet., p. 302, declared the Secretary of War to be "the regular constitutional *organ* of the president for the administration of the military establishment of the nation," so, in the *Castillero* case, 23 How., p. 469, the court declared, with reference to the special grant considered, that the issuing of the title papers "was the proper duty of the Governor, as the *executive organ* of the Department."

Indeed, from time immemorial it was the practice, first under Spain, then under the federal system of Mexico, and again under the central system, for the alienation of public lands to be transacted through the governors as the appropriate instrumentalities. Under the central system, they were the departmental organs for the transaction of all matters of interior government, both civil and military. They were confidential agents of the Supreme Executive in matters of discretionary administration,

notwithstanding that they may have also had specific duties to perform under prescribed rules in certain cases, outside of their more lofty and dignified functions.

They were "the *only* and *necessary conduct of communication* with the Supreme Authorities of the Republic." (*Reynolds*, page 247.)

10. Enough now appears to show that, under the central system as administered in the department of New Mexico, all that was said in the Vallejo and kindred cases as to the non-applicability of the doctrine of presumed powers under a settled constitution and definite, prescribed rules of official action, has no relevancy, except in this, that the Vallejo and Cambuston cases, and others involving the same assumed premises, all admit that, in the absence of known, settled, restrictive constitutions and rules of action, the doctrine of presumption as laid down in the Arredondo and Percheman cases, as well as in *Ely's Administrator vs. United States*, 171 U. S. 220, 224, 231; also *Camou vs. United States*, 171 U. S. 277, 287, must be given at least *prima facie* weight in support of a title issued by an appropriate "constitutional organ" of the Supreme Executive.

The court, speaking by Mr. Justice Brown, in *Crespin vs. United States*, 168 U. S. 208, called attention to the obscurities and difficulties attending a study of the source and nature of Mexican official powers, and proceeded, page 212, as follows:

> "In view of this and similar difficulties, this court, as early as 1832, in *United States vs. Arredondo*, 6 Pet. 691, laid down as a *general proposition* that the grant itself was *prima facie* evidence of its own validity, and that it would be presumed to have been

regularly issued *until the contrary appeared*, or such reasons were offered for *doubting its authenticity* as were sufficient in law to rebut the legal presumption. To the same effect are *United States vs. Clarke*, 8 Pet. 436; and *United States vs. Percheman*, 7 Pet. 51; *Strother vs. Lucas*, 12 Pet. 410, 437; *Reynolds vs. West*, 1 California, 322, 326; *Jones vs. Garza*, 11 Texas, 186, 207."

What is said by the court in the *Arredondo* case, 6 Pet. 691, at pages 728, 734, 737, 746; in the *Percheman* case, 7 Pet. 51, at page 95: "Papers translated from a foreign language, respecting the transactions of foreign officers, *with whose powers and authorities we are not well acquainted*, containing uncertain and incomplete references to things well understood by the parties, but not well understood by the court, should be carefully examined before we pronounce that an officer, holding a high place of trust and confidence, has exceeded his authority;" also pages 96, 97, 98; in the *Peralta* case, 19 How. 343, where "the documentary evidence filed in support of the claim consists of a true copy *from the archives in the office of the Surveyor General of California*"; in the *Cambuston* case, 20 How. 59, at page 63; in the *Vallejo* case, 1 Black, 552; and in the *Crespin* case, 168 U. S. 212, at page 212, all proves it to be the *settled doctrine* of this court that, in the absence of contrary statutory limitations upon the functions of governors exercising the executive power in a colony or department, and being under the control of the Supreme Executive and in subordination to that authority, grants of land made by such governors within their territorial jurisdiction and purporting to be founded on national considerations and

to be issued in the name of the Supreme Government, shall be taken *prima facie* to have been competently executed; and this *a multo fortiori* when it is matter of course for such governors to make stated and frequent reports of their official doings to the Supreme Executive.

The principle of this doctrine has even been extended by this court so as to involve the presumption that a questionable act of territorial legislation reported to Congress and not disapproved, and long enforced in the Territory wherein it originated, shall be deemed to have been ratified by silence.

See *Camou vs. United States*, 171 U. S. 220, at page 277, citing and approving a like proposition in *Clinton vs. Englebrecht*, 13 Wall. 434, at page 446.

And the doctrine, as applied to the present case, gathers emphasis from the fact that the interpretation of constitutions and laws affecting the executive department of the Mexican government has always been regarded as pertaining to *executive*, and not to *judicial* jurisdiction, as is well laid down by Chief Justice Reed in his separate opinion. (See appendix.)

Therefore, our own rule as to the evidential importance of contemporary official practice in the construction of laws and official powers has peculiar application in the adjudication of controversies arising under Mexican laws.

In the circumstances in which Armijo was officially placed, his own acts evidence his authority by their inherent force as an adjudication, and the act of juridical possession adds the force of a judicial judgment.

"No court in the universe," said Chief Justice Marshall, in *Elmendorf vs. Taylor*, 10 Wheaton, 152,

"which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and, therefore, erect itself into a tribunal to correct such misunderstandings."

Hancock vs. McKinney, 7 Tex. p. 442.

Hardeman vs. Herbert, 11 Tex. pp. 656-660.

Cavazos vs. Trevino, 35 Tex. p. 165.

Many "rules of property" have sprung from judicial misconstruction and official and popular errors.

We have already seen that, in the construction of the Mexican law pertaining to executive powers, the executive and legislative departments of Mexico exercised *quasi* judicial functions.

Even recently, this court has intimated that a distinction must be made between presumptions attending grants made by inferior magistrates and those attending grants made by the governors under the central system; for in *Faxon vs. United States*, 171 U. S. 244, 256, 260, the learned Chief Justice said (p. 260):

> "There was a fatal want of power in the departmental treasurer to make the sale, nor was any evidence introduced to show that his action was participated in or ratified by the governor, or by the national government, in any manner. And this is not a case in which the sale and grant can be treated as validated by presumption."

11. We close this subject with a letter from a

distinguished Mexican legist, Señor Don Eduardo Ruiz, who wrote it when he was *Procurador General de la Nacion.*

The original is with the clerk of this court. We feel it to be fortunate to have this expression from an eminent lawyer of that country, especially since Señor Orozco, in his work, has apparently pretermitted all reference to the act of April 4, 1837.

The first central system was a hiatus of a decade between two epochs of the federal constitution of 1824, and it is possible that the fact that the constitution of 1824 was again in force when the subject of California titles began to be agitated in the American tribunals may have led some investigators to assume that that constitution had remained in force without interruption ever since 1824.

The following translation was made by Mr. Ernest Knaebel, and we believe it to be substantially correct.

"PRIVATE CORRESPONDENCE
of the
"ATTORNEY GENERAL
of the
"NATION.

"Mexico, March 6, 1886.

"*Emilio Pardo, Esq., Counselor at Law:*

"DEAR SIR: You desire to know my opinion relative to the Las Animas grant of lands made to Messrs. Vigil and St. Vrain by General Manuel Armijo, as Governor and Military Commandant of the Department of New Mexico, in the year 1843, during the period in which the Mexican nation was ruled by the government of a unified or central republic. I do not know the date of the grant, but if it was made while the

Bases de Organizacion of the provisional government of the republic, adopted at Tacubaya on September 28, 1841, were in force, it is clear that, in conformity with the 6th and 7th *Bases*, the Executive possessed full powers in all branches of public administration, with no other limitation than that of being responsible for his acts to the first Constitutional Congress. The governors and military commandants of the Departments were but mere agents of the Executive, and, consequently, acted under his instructions, private or public, and, in their turn, were accountable only to him in the exercise of their functions.

"If the date of the grant with which I have to deal is after June 12, 1843, then the *Bases de Organizacion politica* of the Mexican Republic were in force, which were in the nature of a constitution or organic act of the country. In them we find that the legislative power had no express authority whatever to pass upon grants of unoccupied or colonization lands, inasmuch as, in respect of these, Section 5 of Article 134 recommends the local authorities of the Department to decree whatever is convenient concerning the acquisition, alienation and exchange (permutas) of property belonging to the Department, providing, however, that, in alienations of lands, the laws in force and the requirements of the colonization laws should be observed.

"Respecting the matter before us, therefore, there existed no law, during that period, except that of April 4, 1837, which provided that the government (National Executive) should proceed to make effective the colonization of the lands of the Republic, by means of sales, emphyteuses, or hypothecs, with the reservation that it

should comply with what had been promised to the soldiers who had co-operated in obtaining national independence, or with whatever enactment Congress should make in favor of the native tribes or of those who might aid in the restoration of Texas, without being embarrassed by the prior colonization laws, which stood abolished, except in so far as they related to the introduction of slaves.

"Thus the central government stood authorized to alienate the public or unoccupied (*baldios*) lands to whatever extent it might deem convenient. The law of March 11, 1842, granted permission to foreigners to acquire and possess real property by purchase, judgment, denouncement or any other title; and, although the limitation was set that these provisions did not include the frontier or border Departments, in respect of which special colonization laws were to be promulgated, withholding this possibility of acquisition by foreigners, this prohibition was not absolute, but could be dispensed with by the Supreme Government of the Republic. Agreeably to this law, the foreigners who acquired real property in the country were considered to be, by that very fact, under the sway of the Mexican law, that is to say, impressed with the obligations and possessed of the rights of Mexicans. I call attention to this point because it will find its application further on. We must bestow particular attention upon the fact that, among the attributes of Congress, established in the Bases, that of legislating over vacant public lands does not exist, for I repeat that this power is consigned to the 6th title, which treats of the 'Government of the Departments.'

"It should not be forgotten that the

political constitutions that established the central government in Mexico, from the constitutional laws of 1836 to the *Bases Organicas* of 1842, were not, in their character, constitutions of expressly defined powers, but that, although some duties were particularized for officials, the limitations that were imposed upon them were very limited indeed, so that it may be said that such public officials were empowered to do anything that the law did not expressly prohibit them from doing, the reverse of what is now commanded by the Constitution of 1857, in conformity with the system whereof it is the citizens who possess that liberty, while the government may not do more than what the law expressly enjoins or permits it to do. And, since the alienation of unoccupied public lands and the matters relative to colonization are functions of an absolutely and solely administrative order, it follows that the government (the Executive), in which the administrative action resided, was the sole instrumentality empowered to alienate the unoccupied public lands or to make grants upon colonization, through its agents, which agents, under the *Bases Organicas* cited, the governors of the Departments were.

"Arguing on the supposition (which is, so far, not only not proven, but not even presented) that Governor Don Manuel Armijo had exceeded his instructions, or had acted without them, this, we have already said, would be only a case of responsibility, which might be exacted by the Supreme Government, and by no one else. That this is certain is sufficiently demonstrated by the character of the political institutions which governed at that time; but, aside from the provisions hereinbefore cited, and merely to

strengthen this consideration, I mention the decree of July 7, 1854, issued by the dictatorial government of Don Antonio Lopez de Santa Anna, subjecting to revision titles by alienations of vacant public lands made from 1826 to 1854, and declaring null those alienations which had been assented to by the Departments of the central system without the knowledge and approval of the General Government. A decree which could have no application to the case of Vigil and St. Vrain, because New Mexico, at that date, was already a territory of the United States, and which, furthermore, was specially abrogated by the provisional president, Don Juan Alvarez, on December 3, 1855.

"From what has hitherto been said, it follows that the Departmental governments had power to make grants of lands, and that General Armijo's government could make that in favor of Vigil and St. Vrain, of the lands called Las Animas; and it likewise follows, manifestly, that the grant under discussion was not objected to by the General Government prior to the celebration of the Treaty of Guadalupe: so that the grantees enjoyed a right of ownership, the lawfulness of which was disputed them by no one.

"But, supposing that it be desired, today, to dispute that lawfulness in opposition to the grantees, no one will doubt that the celebration of the Treaty of Guadalupe found them in possession of the granted lands—a possession undisputed since 1843.

"According to Mexican legislation, and I have reference principally to the legislation of that epoch, possession, simple holding or occupation of the *res*, conferred upon the possessor the advantage of a presumption in his favor (while the contrary re-

mained unproven) that his right was a perfect right of property; and he who, in this way, quietly and peaceably maintained his possession for the period of a year and a day was not obliged to account for his possession, for nothing more was required of him than actual possession and the intention to maintain this right to raise the presumption that he held it in good faith. It was so provided in the ~~ten~~ laws, ~~(las leyes~~ 10 , title 30, Partida 3, and in the 3rd law, title 8, Book 11 of the *Novísima Recopilacion*.

"With us, possession, juridically considered, has its origin in Roman legislation, which rated it, not merely as the consequence of a right, but as the right itself. Its foundation is that rule written in the law of the Twelve Tables, which says: 'He who possesses a thing for one or two years makes himself its owner.' So respected is this right that the possession, even supposing it to be illegal, is guaranteed to the possessor by means of compulsory (violentos) proceedings, which are the subject-matter of the Interdicts.

"Vigil and St. Vrain were at least possessors of the Las Animas lands, upon the conditions and with the advantages imposed and given by law; and only the government was entitled to recover the full right of property by means of a legal proceeding. If, instead of this being done, we find some authentic act whereby we are convinced that the government recognized and respected that possession, then it is clearly in accordance with legal principles to affirm that, by that declaration of the government, the full legal ownership of the lands which, for the sake of the argument, we have supposed

they held by right of possession, became firmly vested in Vigil and St. Vrain.

"Such an act we find solemnly authenticated in the Treaty of Guadulupe Hidalgo, ratified by the Mexican government May 30, 1848. In Article 8, it was stipulated that the Mexicans established in territories formerly belonging to Mexico might retain the property of which they were in *possession*, or dispose of it. The Treaty did not use the word ownership, because, as this article was drawn in favor of the Mexicans whom the treaty forced to change their country, at least as regarded the *situs* of their property, it sought to employ a more generic word, which might insure their rights, embracing all their property, however the nature of their enjoyment thereof might be considered elsewhere. And this, although the Mexican citizens should afterwards acquire the title and rights of citizens of the United States. We have already said that, assuming that those who possessed these lands by virtue of grants made by the Departmental governments were not Mexicans, still they should have been considered as such, so far as concerns the rights and obligations they contracted by their respective agreements, and, consequently, they are included in the declaration made in Article 8 of the Treaty of Guadalupe.

"If the annulment of grants was, as it is, an act of sovereignty, when the Mexican government did not attempt it, but rather shielded with its protection those who were about to be subjected to another sovereignty, in no way can the grantees be deprived of their rights by the government of the United States, because, if the latter government should attempt to do so, it would either be assuming the exercise of the sovereignty of

Mexico in order to annul grants made prior to the thirtieth of May, 1848, or it would be applying, in the examination of grants, American laws—which could not have been in force when the contracts were made, and which must be considered as operating retroactively, on the supposition that, for the Mexicans with whom Article 8 of the Treaty of Guadalupe has to do, they began to be in force since the promulgation of that official document—and attempting to apply such laws to cases of anterior origin: both suppositions lead us to absurd results.

"I am always, dear sir, warmly and respectfully yours,

"EDUARDO RUIZ."

Conclusion.

"Few cases presented to this court are more perplexing than those involving Mexican grants. The changes in the governing power as well as in the form of government were so frequent, there is so much indefiniteness and lack of precision in the language of the statutes and ordinances, and the modes of procedure were in so many respects essentially different from those to which we are accustomed, that it is often quite difficult to determine whether an alleged grant was made by officers who, at the time, were authorized to act for the government, and was consummated according to the forms of procedure then recognized as essential. * * * We are not to presume that, because certain officials made a grant, therefore it was the act of the Mexican government and to be sustained. It must appear that the officials did have the power, and we are not justified in *resting* upon any legal presumption of the

existence of the power from the fact of its exercise.

"While this is true, yet when the statutes and ordinances defining the powers and duties of an officer are somewhat indefinite and general in their terms, and that officer was in the habit of exercising the same power as was exercised in the case presented, and such exercise of power was not questioned by the authorities of Mexico, and grants purporting to have been made by him were never challenged, there is reason to believe that the true construction of the statutes and ordinances supports the existence of the *power*." (*Ely's Administrator vs. United States*, 171 U. S. 220, at pages 223, 224.) And a title vested before the treaty cession could not be divested arbitrarily. *Camou vs. United States*, 171 U. S. 277, 290, 291.)

The principles which underlie the ordinary law of agency apply to official acts done in an alleged representative capacity. This court has said, as to private agents, that, if an agent has been permitted for years to pursue a particular course of conduct, it will be *presumed* that he had authority so to act.

Martin vs. Webb, 110 U. S. 7, 14.

And Mr. Justice Brewer adverts to this same doctrine as suggesting a presumption in favor of official action in certain circumstances. See the *Ely* case, 171 U. S. 220, at page 232.

The doctrine does not, of course, mean that a mere pretense of agency, by an unaccredited stranger, carries a favorable presumption, but rather that, when the law and the evidence indicate fairly that a person is so related to a superior as to be in some sense immediately representative, the *scope* and *ex-*

tent of such representation may be shown by a course of dealing, and by other circumstances.

Our grant was made in evident consultation with the comptroller and treasurer of the department. (*Transcript*, fols. 77, 89.) It involved the *satisfaction* of a long standing pecuniary account between Sandoval and the nation, for it was asked in "compensation" and granted accordingly. (*Ib.*, fols. 75, 76.) The governor was directly "responsible" to the Supreme Executive, and there results "the presumption, very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done." See citation by Mr. Justice Brewer, in the *Ely* case (171 U. S., at page 231), from the *Mitchel* case (9 Pet. 711, 742).

Even under the federal system, such a grant would seem to come directly within the contract provisions contained in Articles 10 and 11 of the colonization law of 1824 (*Reynolds*, page 121) for pension lands to old soldiers, and for the compromising of salaries, etc., of military and civil employés by the alienation to them of "*any* portions" of the public domain—provisions intended evidently to operate in the full measure and degree of any public duty or obligation whose discharge was intended, and therefore not to be restricted by the limitations of area provided, under a different policy, for ordinary gratuitous colonists; even which limitations, however, did not obtain in New Mexico under the central system.

While Antonio Sandoval (and consequently his grantee, Gervacio Nolan), having gone into actual possession of the granted premises under a *juridical* act, and claimed the same as an *hacienda* or cattle ranch, under a title consummate at least as early as

December 15, 1845, the date of the delivery of seisin, would have had a good legal standing even under the old law, had it been in force at that time, still it is evident that his standing was far more serious and meritorious than that of an ordinary volunteer colonist who had secured a gratuitous title for the mere asking. Sandoval asked for a grant "*in the name of the Supreme Government*," for an exceedingly valuable consideration, namely, (1) unpaid services rendered as a civil and military employé of the nation for nearly forty years, of which ~~nine~~ six had been spent at the head of the prefecture—even the unpaid salary due him as prefect amounting to $9,000—and also (2) a very large amount due him for *money lent to the nation*. He applied to the one official who was "the only and necessary conduct of communication" with the Supreme Government, and that official was at once Governor, Commandant General, and Head of the Treasury, well cognizant of the state of accounts between Sandoval and the Government. He asked for the grant in *compensation*, and, consequently, *satisfaction*, of his large claim. He asked this settlement as a matter of "*justice*." The law of April 4, 1837, had devoted the public lands to the satisfaction of debts *already contracted* as well as of debts that *might be contracted* in the future. The nation was in great need of cash to pay troops on the eve of mobilization of an increased army for the impending war. Armijo, as Commandant General, had already been warned to employ the moneys of the Departmental Treasury for the preferential uses of the army. To pay Sandoval money would have been unpatriotic, if Sandoval would take land instead; for land had no money value and it was idle to attempt to raise cash in New Mexico by ordinary sales. Al-

ways patriotically self-sacrificing, Sandoval offered to take the land, which the nation could spare, instead of money, which it could not spare.

The deal was consummated. Nearly sixty years have elapsed.

Did the treaty of Guadalupe Hidalgo guarantee Sandoval the right "to retain the property" which he then "possessed," or not? Would the Mexican government have ever disturbed a right so fairly earned, so fully paid for? Did the Supreme Government, by the treaty, sell to us a right to *forfeit* this honest title, or did it guarantee its integrity? Compare what was said by the court in the *Ely case*, 171 U. S., at pages 238, 239, 240, when it spoke by Mr. Justice Brewer, with what was said by the court in the *Arredondo* case, 6 Pet., at pages 736, 737, 740, when it spoke by Mr. Justice Baldwin, and we find the court, in both cases alike, interpreting treaties according to the maxim, *noblesse oblige*.

Mr. Justice Brewer said (171 U. S. pages 238, 239):

> "Sustaining the validity of the grant *to the extent of the land paid for* is but carrying out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the Court of Private Land Claims. * * * Article 8 of the treaty of Guadulupe Hidalgo provided, in reference to the ceded territory, that 'Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or

disposing thereof, and removing the proceeds wherever they please, without being subjected, on this account, to any contribution, tax, or charge whatever,' and that, 'in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected.' 9 Stat. 929. * * *

"The spirit of the treaty is fully carried out when the amount of land *petitioned and paid for* is secured to the grantee or his successors in interest. This Government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. * * *

"It must be remembered, in this connection, that, by section 7 of the act creating the Court of Private Land Claims, it is provided 'that all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States.' Therefore, in an investigation of this kind that court is not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico."

In the *Arredondo* case (6 Pet., at page 737), reference is made to the solicitude of the king to protect the rights of his colonial subjects—

"By using words which expressed his intention, in his own language, that the grants were ratified and confirmed by both governments, in the very act of cession, subject to no future contingency. This furnishes a powerful and obvious reason for inserting this article in Spanish, so that the intention

would be clearly understood, by words denoting it in a manner not to be mistaken, whenever any doubt should arise; and whenever the treaty should be produced as evidence of the cession, or for any other purpose, there should always appear, in the native language of his then, or former, subjects, full evidence of his declared intention to protect their rights, acquired by his grants, pledging his honor and faith for their security. His minister was not willing to trust so important a matter to a treaty only in the English language. The present situation of the holders of the grants, the state of the country, the opinion of this court in *Foster vs. Neilson* [2 Pet.], and the arguments in this cause, show the wisdom and justice which prompted him to express the intention of the king in his own language and that of his subjects."

Thereupon, since that treaty had been committed (as that of Guadalupe Hidalgo has since been) to *judicial* construction, the court proceeded to overrule the former *political* construction, and, accepting the Spanish version, declared (page 741):

"The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words, and expressed his intention, and, though the American version showed the intention of this government to be different, *we cannot adopt it as the rule* by which to decide what was granted, what excepted, and what reserved; the rules of law are too clear to be mistaken, and *too imperative to*

> *be disregarded by this court.* We must be governed by the clearly expressed and manifest intention of the grantor, and not the grantee, in private, *a fortiori*, in public grants."

We submit that, by the treaty of cession, Mexico delivered political jurisdiction of New Mexico over to the United States, subject to the sacred duty to protect our "*justo título adquirido*" to the Estancia, as a "complete and perfect" private acquisition, and to permit us to retain it as the legitimate satisfaction paid and delivered by Mexico to Antonio Sandoval for forty years of faithful public service, in peace and war, and for his pecuniary advances to the national treasury.

We respectfully ask the court to peruse the powerful and eloquent dissenting opinion of Mr. Justice Grier, in the *Vallejo* case, 1 Black, 541, at page 555, *et seq.*, which, we believe, would have expressed the unanimous opinion of the court, had no doubt existed in the minds of the majority on the subject of the authenticity of Vallejo's title, and especially had the bench which then officiated been as well informed in this "perplexing" class of cases as is the bench which we have the honor to address.

Respectfully submitted.

JNO. H. KNAEBEL,
ERNEST KNAEBEL,
of Counsel for Appellants.

APPENDIX.

Opinion of Señor Don Eduardo Ruiz, *Procurador General de la Nacion*, on the representative authority of Manuel Armijo, Governor and Commandant General of the Department of New Mexico, to make grants under the central system of government.

[The original of the following letter of Señor Ruiz is left with Mr. McKenney for the inspection of the court.]

"CORRESPONDENCIA PARTICULAR
del
" PROCURADOR GENERAL
de
" LA NACION.

" México, Marzo 6 de 1886.

"*Señor Lic. D. Emilio Pardo,*
" *Muy Señor mio:*

" Desea U. conocer mi opinion relativa á la concesion de tierras de Las Animas hecha á los Señores Vigil y St. Vrain por el Señor General Don Manuel Armijo, como Gobernador y Comandante Militar del Departamento de Nuevo México, en el año de 1843, época en que la nacion mexicana estaba regida por un gobierno de República unitaria ó central. No conozco la fecha de la concesion, pero si esta se verificó estando vigentes las Bases de Organizacion para el gobierno provisional de la República adoptadas en Tacubaya en 28 de Setiembre de 1841, es claro que conforme á las Bases 6a

y 7a el Ejecutivo tenia plenas facultades en todos los ramos de la administracion pública, sin mas limitacion que de la responder de sus actos ante el primer Congreso Constitucional. Los gobernadores y comandantes militares de los Departamentos no eran otra cosa que meros agentes del Ejecutivo y en consecuencia obraban con sus instrucciones, reservadas ó públicas, y á su vez, solo eran responsables ante él en el ejercicio de sus funciones.

"Si la fecha de la concesion de que me ocupo es posterior á la de 12 de Junio de 1843, entonces estaban vigentes las Bases de Organizacion política de la República Mexicana que tenian el carácter de Constitucion ó Ley fundamental del pais. En ellas encontramos que el poder legislativo no tenia facultad alguna espresa para determinar sobre concesiones de terrenos baldíos ó de colonizacion, pues que respecto de estos, la fraccion 5a. del artículo 134 encomienda á las autoridades locales del Departamento decretar lo conveniente respecto de adquisicion, enagenacion y permutas de bienes que pertenecian al Departamento; pero disponiendo que sobre enagenaciones de terrenos se observaran las leyes vigentes y lo que determinaban las de colonizacion.

"Ahora bien, respecto de esta materia no habia en aquella época mas ley que la de 4 de Abril de 1837 que dispuso que el gobierno (Ejecutivo Nacional) procediera á hacer efectiva la colonizacion de los terrenos de la República, por medio de ventas, enfiteucis ó hipotecas, con la reserva de dar complimiento á lo prometido á los militares que cooperaran á la independencia ó á lo que el Congreso decretare en favor de las tribus indígenas ó de los que ayudasen al restablecimiento de Texas, sin embarazarse

por las leyes anteriores de colonizacion que quedaban derogadas, excepto en lo relativo á introduccion de esclavos.

"De esta manera quedó el gobierno central facultado para enagenar los terrenos nacionales ó baldíos en cualquiera estension de ellos que le pareciera conveniente. En la ley de 11 de Marzo de 1842 se permitió á los extrangeros adquirir y poseer bienes raices por compra, adjudicacion, denuncia ó cualquiera otro título; y aunque se puso la limitacion de que estas disposiciones no comprendian á los Departamentos limítrofes ó fronterizos, respecto de los que se expedirian leyes especiales de colonizacion, sin que pudiesen adquirirse por extrangeros, esta prohibicion no era absoluta, sino que podia ser dispensada por el Gobierno Supremo de la República. Conforme á esta ley los extrangeros que adquirian bienes raices en la nacion, se consideraban por el mismo hecho, bajo el imperio de la ley Mexicana, es decir con las obligaciones y derechos de los Mexicanos. Llamo sobre este punto la atencion porque encontrará aplicacion mas adelante. Tambien hay que fijarse en el hecho de que entre las atribuciones del Congreso, establecidas en las Bases, no está la de legislar sobre terrenos baldíos pues repito que esta se halla consignada en el título 6o. que habla del 'Gobierno de los Departamentos.'

"No debe olvidarse que el carácter de las constituciones políticas que establecieron en México el gobierno central, desde las leyes constitucionales de 1836 hasta las Bases Orgánicas de 1842 no era el de poderes espresamente determinados; sino que aunque se detallaban algunas obligaciones á las funcionarios, las limitaciones que se les ponian eran limitadísimas: de tal manera, que puede

decirse que dichos funcionarios públicos podian hacer todo aquello que no les prohibia expresamente la ley, al contrario de lo que dispone actualmente la Constitucion de 1857, conforme á cuyo sistema, los ciudadanos son los que tienen esa libertad, mientras que el gobierno no puede hacer mas que aquello que la ley espresamente le manda ó le permite hacer. Y como la enagenacion de terrenos baldíos y los asuntos relativos á colonizacion, son funciones de un órden absoluta y meramente administrativo, resulta que el gobierno (el Ejecutivo), en quien residia la accion administrativa, era el único que podia enagenar los terrenos baldíos ó hacer concesiones sobre colonizacion por medio de sus agentes que lo eran, conforme á las Bases Orgánicas citadas, los gobiernos de los Departamentos.

"En el supuesto (que hasta ahora no está, no solo probado, sino ni siquera presentado) de que el gobernador Don Manuel Armijo se hubiera extralimitado de sus instrucciones ó hubiera obrado sin ellas, ya hemos dicho que este seria solamente un caso de responsabilidad, exijible por el Gobierno Supremo y por nadie mas. Que esto es cierto, basta para demostrarlo el carácter de las instituciones políticas que entonces regian; pero aparte de las disposiciones citadas anteriormente y solo por robustecer esta consideracion menciono el decreto de 7 de Julio de 1854, espedido por el gobierno dictatorial de Don Antonio Lopez de Santa Ana sometiendo á revision los títulos de enagenaciones de baldíos hechas desde 1821 á 1854 y declarando nulas las verificadas por los Departamentos del sistema central, sin conocimiento y aprobacion del Gobierno general, decreto que no podia tener aplicacion en el caso de Vigil y St. Vrain, porque

Nuevo México era ya en esa fecha territorio de los Estados Unidos y que á mayor abundamiento fué especialmente derogado por el Presidente provisional Don Juan Alvarez en 3 de Diciembre de 1855.

"De lo dicho hasta aquí resulta que los gobiernos de los Departamentos tuvieron facultad para hacer concesiones de terrenos y que el gobierno del General Armijo pudo hacerla en favor de Vigil y St. Vrain en las tierras llamadas Las Animas y resulta tambien de una manera evidente que la concesion de que se trata no fué objetada por el Gobierno General ántes de celebrarse el Tratado de Guadalupe: de modo que los concesionarios tenian en su favor un título *de propiedad* cuya legitimidad nadie les reclamó.

"Pero suponiendo que hoy quiera disputárseles esa legitimidad, nadie pondrá en duda que la celebracion del Tratado de Guadalupe los halló en posesion de las tierras concedidas, posesion indisputada desde 1843.

"Conforme á la legislacion Mexicana, y principalmente me refiero á la de aquella época, la posesion, simple tenencia de la cosa, daba al que la tenia el carácter ventajoso de presumir en su favor un título perfecto de propiedad, mientras no se probaba lo contrario; y el que poseia de esta manera quieta y pacificamente por espacio de un año y un dia, no estaba obligado á responder sobre la posesion: pues le bastaba la tenencia corporal y el ánimo de mantener este derecho, para suponer que lo tenia de buena fé. Así lo disponian las leyes 10, título 30 Partida 3a., y la 3a. título 8o. Libro 11 de la Novísima Recopilacion.

"La posesion entre nosotros, considerada juridicamente trae su orígen de la legislacion Romana que no la apreciaba solamente

como la consecuencia de un derecho, sino como el derecho mismo: su base es aquella regla escrita en la Ley de la Doce tablas que dice: 'El que posee una cosa durante una ó dos años se hace su propietario.' Tan respetado es este derecho que aun suponiendo ilegal la posesion, la ley la garantiza al poseedor por medio de procedimientos violentos que son la materia de los interdictos.

"Vigil y St. Vrain eran por lo menos poseedores de las tierras de Las Animas, en las condiciones y con las ventajas de la ley; y solo el gobierno tenia el derecho de reivindicar la propiedad por medio de un procedimiento legal. Si en vez de hacer esto, hallamos algun acto auténtico por el que lleguemos á convencernos de que el gobierno reconoció y respectó esa posesion, entonces es claro y jurídico afirmar que por esa declaracion del gobierno, quedó consolidada la propiedad en favor de Vigil y St. Vrain de los terrenos que bajo un supuesto hemos imaginado que tenian en posesion.

"Ese acto lo encontramos solemnemente autenticado en el Tratado de Guadalupe Hidalgo, ratificado por el gobierno Mexicano en 30 de Mayo de 1848. En el artículo 8o. se estipuló que los Mexicanos establecidos en territorios pertenecientes ántes á México podian conservar los bienes que *poseian* ó enagenarlos. El Tratado no usó de la palabra propiedad, porque siendo redactado este artículo en favor de los Mexicanos, á quienes el tratado hacia cambiar de patria, siquiera fuese en cuanto á la ubicacion de sus bienes, quiso emplear una palabra mas genérica que asegurase los derechos de aquellos, abrazando todos sus bienes, cualquiera que por otra parte fuese el carácter con que los disfrutaban. Y esto, aunque

los ciudadanos Mexicanos adquiriesen despues el título y derechos de ciudadanos de los Estados Unidos. Ya hemos dicho que, suponiendo que los poseedores de esos terrenos en virtud de concesiones hechas por los gobiernos de los Departamentos, no fuesen Mexicanos, debian considerarse como tales en cuanto á los derechos y obligaciones que contraian por sus respectivos contratos, y en consecuencia están incluidos en la declaracion que se hizo en el artículo 8 del Tratado de Guadalupe.

"Si la anulacion de las concesiones era, como es, un acto de la soberania; cuando el gobierno Mexicano no la pretendió, sino que ántes bien escudó con su proteccion á los que iban ya á ser súbditos de otra soberania, de ninguna manera pueden los concesionarios ser privados de sus derechos por el gobierno de los Estados Unidos, porque si estos lo pretendieran hacer, ó asumirian el ejercicio de la soberania de México para anular las concesiones hechas con anterioridad á 30 de Mayo de 1848 ó aplicarian al exámen de las concesiones, leyes Americanas que no pudieron estar vigentes cuando se celebraron los contratos y que podrian considerarse de efecto retroactivo, supuesto que la vigencia de ellas para los Mexicanos de que habla el artículo 8o. del Tratado de Guadalupe comensó desde la publicacion de ese documento oficial, y se trataria de aplicarlas á casos que tienen un origen anterior. Ambas suposiciones nos conducirian á resultados absurdos.

"Me repito de U. afectísimo, atento y S. S.,

"EDUARDO RUIZ."

Dissenting opinion of Associate Justice Stone:

"IN THE

"U. S. COURT OF PRIVATE LAND CLAIMS,

"Santa Fé, New Mexico, December ..th, 1900.

"JOEL PARKER WHITNEY,
"No. 152. *vs.* } The Estancia Grant.
"THE UNITED STATES.

"Stone, Associate Justice: My dissent from the decree in this case seems to be all the more justified in view of the failure of the other justices to find any common ground on which they can stand against the title conferred by the Mexican authorities on Antonio Sandoval.

"1. Justice Murray presents in his opinion cogent reasons for holding (according to our mode of interpretation, as distinguished from the Mexican), that the federal system of colonization, formulated in the colonization law of 1824 and the regulations of 1828, was utterly subverted by the adoption of the central system and the statutes and decrees promulgated during the central period of Mexican history in relation to the disposition of public lands. It is apparent that Justice Murray would have favored the confirmation of the grant in question but for his doubt as to the powers at the time of the supreme executive—a doubt which I do not share.

"2. The opinion of Justice Sluss, fully concurred in by Justice Fuller, maintains the proposition that the colonization law of

1824, as well as the regulations of 1828, continued in force under the central system, even after the adoption of the new colonization law of April 4, 1837, and the Bases of Tacubaya of September 8, 1841 (Reynolds, 234), although the federal states and territories had all been abolished and a uniform 'department' substituted for each. This opinion assumes the concurrent operation of the old system of colonization, which was based on a federal policy, and the new system, which was based on an inconsistent central policy; but it is impossible for me to understand why the grant should be rejected as being in conflict with the old law when it can well be upheld as in harmony with the new.

"3. The chief justice, in his separate opinion, lately filed, takes the novel ground that the regulations of 1828 might have been adopted and continued in practice by the executive department of the government, even in spite of the repeal of the federal law under which they were originally issued. There is much in this opinion to elucidate the obscurity which attends the subject of executive grants made under the central system, for the chief justice shows by the contemporaneous practice of the executive authorities that the public domain was treated as a subject of executive administration, and he calls attention to the pertinent fact that the construction of both constitutions and statutes was within legislative and executive jurisdiction, independently of the judicial tribunals. I concur in the argument of this opinion, but that argument leads me to the inevitable conclusions, first, that the making of the grant in question was within the competency of the supreme executive, and, second, that Governor Armijo was his ap-

propriate ministerial agent in its execution. Article 141 of the *Bases Orgánicas* provides: 'The governors are the only and necessary conduct of communication with the Supreme Authorities of the Republic. The cases of accusation or complaint against themselves and the official correspondence of the superior tribunals with the Supreme Court of Justice in judicial matters are excepted.'

"WILBUR F. STONE,
"*Asso. Justice.*

"December 20th, 1900."

Separate opinion of Chief Justice Reed:

"IN THE

"U. S. COURT OF PRIVATE LAND CLAIMS,

"Santa Fé, New Mexico, December 10th, 1900.

"JOEL PARKER WHITNEY,
"152. *vs.*
" THE UNITED STATES. } The Estancia Grant.

"Reed, C. J.: I concur in the conclusion reached in this case, but do not agree with all that is said in the opinion of Associate Justice Sluss. It is held in the opinion that the Colonization Law of Mexico of August 18th, 1824, remained in force at the time the grant in question was made. In view of the language of the law of April 4th, 1837, I do not concur in that holding. But in my opinion the question as to the effect of the law of 1837 on that of 1824 is quite immaterial, for the grant was made not under that law, but under the regulations of November 24th, 1828, which was a decree of the President of the Republic promulgated under authority conferred by the law. The law regulated the matter of the disposition of the public lands by the states within their jurisdictions, and conferred upon the executive of the government power to make all necessary regulations for the disposition of such lands within the Territories of which New Mexico was one. The question, then, is not whether the law remained in force, but whether the regulations continued operative when the grant was made. And it is manifest that the law which governed the matter within the states might be repealed without at all affecting the regulations established by the Executive, governing the same subject within the

Territories. The law of 1837 provides that the Government (*i. e.*, the Executive), in concurrence with the council, shall proceed to make effective the colonization of the lands which are or should be the property of the Republic, and that it, the government, should not be compromised by the laws heretofore enacted on colonization, which *enactments* are all repealed in so far as they conflict with this law. Clearly this law confers upon the executive and the council all powers with reference to the disposition of all public lands, just as the former law had conferred the same power with reference to such lands within the Territories upon the executive. True, it required that the proceeds, which *in the first instance should not be* less than $1.25 per acre, should be applied to the payment of the public debt. Just what was the effect of the words '*in the first instance*' in the law is difficult for us to determine. The duty of construing the act, as a whole, and in its parts, devolved upon those officers whose duty it was to administer it, and their interpretation was final and conclusive, for in Mexico the laws which relate to the executive department are not the subject of judicial construction, but the executive and legislative departments are the sole judges, both of the constitutionality and effect of such laws.

"We know as matter of fact that in all the territory acquired by the United States from Mexico there never was a sale of land by Mexico at $1.25 per acre, or for an amount anywhere near that. Yet public lands were continually disposed of in that territory after 1837. This circumstance affords ample evidence to my mind that a construction was placed upon the words of

the law favorable to the disposition of lands in the remote regions of the country at a less price, and even permitting them to be granted without consideration other than that of settlement when the real interest of the country and people would thereby be conserved.

"But the executive was required also to determine the effect of the repealing clause of the law; whether it had the effect to repeal the regulations of 1828 as well as the Colonization Law of 1824, or whether its effect was upon the latter only while the regulations were left in force and effect. If the latter construction was adopted, then every right to lands in the ceded territories which accrued under that construction is now entitled to be protected. It makes no difference that we may think the construction erroneous, for it is our jurisdiction only to inquire as to the rights which accrued as against the government of Mexico under its laws, as they were construed by those officers who were charged with the duty of executing them. And it will hardly be denied that a valid right might accrue as against the government under an erroneous interpretation of the law if the officer who made that interpretation was the sole and final judge of the question.

"I admit that I know of no direct, written evidence that the construction above suggested was placed upon the law of 1837. But in Mexico the practice, as is done with us, of preserving and publishing the official construction placed upon statutes does not appear ever to have obtained. But the uniform and continuous course of procedure with reference to the disposal of public lands in the territories as it is disclosed by the public records both in California and

New Mexico, convinces me that that construction was placed upon the law by every department of the government, and by every public officer who performed any duty, with reference to the subject.

"The governors of California and New Mexico continuously made grants of land after 1837, and up to the time of the American occupation of the country, asserting in every instance the power to make the grant under the regulations of 1828. Those officers were required to make periodical reports of their official actions, so that the executive and legislative departments of the government were presumably informed of all that was being done in the matter and the alleged authority under which it was done, and so far as we know, there never was a word of disapproval of the practice or of administration on the subject from any department or officer superior to the governor.

"In addition to that, no other method for the disposal of public lands within those territories was ever provided after 1837, and it seems incredible that the government would have omitted to make such provision if no provision at all existed with reference to the subject, for all of its interests would be promoted by the settlement and improvement of these remote regions, and the prosperity of the inhabitants and their residence in the country could be promoted only when ample means were afforded them for acquiring lands.

"These considerations lead me to the conclusion that all grants made in conformity to the regulations of 1828, after the enactment of the law of 1837, are entitled to confirmation.

"(Signed) JOSEPH R. REED,
"*Chief Justice.*"